Service of the within and receipt of a copy thereof is hereby admitted this _____ day of January, A.D. 1976.

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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-312

ROMAN GRIBBS, Mayor of the City of Detroit, *et al.*,
Petitioners,

vs.

AMERICAN MINI THEATRES, INC., a Michigan corporation, and PUSSY CAT THEATRES OF MICHIGAN, INC., a Michigan corporation,
Respondents.

ROMAN GRIBBS, Mayor of the City of Detroit, *et al.*,
Petitioners,

vs.

NORTOWN THEATRE, INC.,
Respondent.

Brief of Respondents American Mini Theatres, Inc. and Pussy Cat Theatres of Michigan, Inc.

Questions Presented.

1. Whether the Detroit ordinances, 742-G and 743-G, which limit severely the locations available within the City for the establishment of "adult" theatres and bookstores, deny Respondents the equal protection of the laws guaranteed by the Fourteenth Amendment

because the ordinances classify and impose restrictions upon theatres and bookstores disseminating constitutionally protected expression solely on the basis of the content of the expression, which classification is not necessary to further any compelling state interest, and is not even rationally related to any legitimate state interest.

2. Whether the Detroit ordinances, 742-G and 743-G, violate the free speech and press provisions of the First and Fourteenth Amendments, because the ordinances directly abridge protected expression and, alternatively, even if viewed as a regulation of non-speech elements in a course of conduct which incidentally limits First Amendment interests, the ordinances fail to further a compelling, important or substantial governmental interest, fail to serve any governmental interest unrelated to the suppression of free expression, and restrict the exercise of First Amendment freedoms in a manner far greater than essential to the furtherance of any legitimate governmental interest.

3. Whether the Detroit ordinance, 743-G, requiring adult theatres to be licensed by the Mayor, but permitting the Mayor to refuse such license on the basis of broad and indefinite standards, and which lacks any procedural safeguards, constitutes an impermissible prior restraint of First Amendment rights and further deprives persons desiring to operate adult theatres of the equal protection of the laws, contrary to the First and Fourteenth Amendments.

Statutes and Ordinances Involved.

Ordinance No. 742-G appears in Appendix "G" to the petition for writ of certiorari, pages 65-79.*

Ordinance 743-G appears in Appendix "H", pages 80-84.

Statement of the Case.

In 1962, the City of Detroit enacted §66.0000 of the Official Zoning Ordinance which classified certain businesses as "regulated uses." (App. G, p. 67; Pets. Br., p. 16). That section recited:

> "In the development and execution of this ordinance, it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the adjacent areas. Special regulation of these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood. These special regulations are itemized in this section. The primary control or regulation is for the purpose of preventing a concentration of these uses in any one area (i.e., not more than two such uses within 1,000 feet of each other which would create such adverse effects). Uses subject to these controls are as follows:

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*In this brief, Respondents refer to the various appendices by their letter designation, such as Appendix "A", etc. Appendices A through I appear as appendices to the petition for

(This footnote is continued on next page)

Establishment for the sale of beer or intoxicating liquor for consumption on the premises.
Hotels or motels.
Pawnshops.
Pool or billiard halls.
Public lodging houses.
Secondhand stores.
Shoeshine parlors.
Taxi dance halls." (Brief for Petitioners, pp. 16-17).

Section 66.0100 provided:

"Application to establish any of above regulated uses shall be made to the City Planning Commission, who shall not approve any such request if there is already in existence two or more such regulated uses within 1,000 feet of the boundaries of the site of the proposed regulated use, excepting as provided for in §66.0101." (Pets. Br., p. 17).

Section 66.0101 permitted the Commission to waive the foregoing prohibition if the following findings were made:

"(a) That the proposed use will not be contrary to the public interest or injurious to nearby properties, and that the spirit and intent of this ordinance will be observed.

"(b) That the proposed use will not enlarge or encourage the development of a 'skid row' area.

"(c) That the establishment of an additional regulated use in the area will not be contrary to any program of neighborhood conservation nor will it interfere with any program of urban renewal.

a writ of certiorari herein. Appendices J through Q appear in the single appendix filed concurrently with the brief for the petitioners.

"(d) That all applicable regulations of this ordinance will be observed." (App. G, p. 68).

When the foregoing ordinances were enacted in 1962, the Detroit Common Council relied upon the opinions of Mel Ravitz, a Professor of Sociology with expertise in urban planning, and a member of the Common Council (App. J, p. 3). Ravitz wrote a letter in 1962 to an assistant corporation counsel setting forth in detail his reasons for supporting the above ordinance, known as the "Anti-Skid Row Ordinance" (App. J, pp. 8-12). Ravitz's 1962 letter stated, in pertinent part:

"The ordinance in question seeks to restrict concentration of six specified uses on the ground that any such concentration is an actual danger sign in a residential area.[1] It is such a threat in that it leads people to believe the neighborhood is declining, and more of the kind of people who accept a declining neighborhood flock there. This process hastens the reality of neighborhood decline.

* * *

"Another related point must be made, too: Many people who live in many areas view such concentration as undesirable and believe it is bad. Here a basic sociological axiom is relevant: If people believe something is true, even if it is

[1]The references in the letter to "residential" areas and neighborhoods is curious insofar as the designated "regulated uses" are not permitted at all in areas zoned exclusively for residential purposes, independent of the provisions of the "Anti-Skid Row Ordinance."

not originally, they will tend to act as if it were true, and in so doing help produce the condition that was originally only believed. If residents of any neighborhood believe that the concentration of the proscribed uses damage the neighborhood, they will act as if it were true and will seek to move away and allow in people with different standards; they will allow their property to decline; they will not engage in the full range of conservation attitudes and activities so necessary to the maintenance of a healthful residential neighborhood.

"As an actual fact that concentration of such proscribed uses where the people don't want them leads inevitably to rate cutting, indiscriminate displays of merchandise, illegal activities in order to attract scarce customers. These things, too, help to deteriorate a neighborhood.

"A residential neighborhood is a very fragile thing. It can be ruined very easily . . . . Ruin comes to a neighborhood because its residents somehow begin to have their confidence in their area shaken. It matters not what the cause of this shaken confidence, whether it be a legitimate or phony cause. Good neighborhoods are maintained because people who live in them believe that they are sound and good and will continue to be so in the months and years ahead. It is far too risky for a city to allow indiscriminately into residential areas any number of commercial uses which have already been identified as those whose concentration help shake people's confidence.

"The question has been raised: Why pick on these particular uses? The answer is simply that rightly or wrongly these uses in the minds of many people are the symbols of decay and deterioration. They certainly are not the only such uses that should be controlled; *all night movies*, burlesque shows, *drive-ins*, etc., also must be controlled, because they, too, have the same undesirable image. (Emphasis added).

"Let us recognize that most normal residential neighborhoods have a certain cohesion and stability that is sufficient to permit them to function adequately and healthfully and to resist a few such proscribed uses. A neighborhood can handle more such uses if they are spaced so as to have no more than two per 1,000 feet. While two was originally an arbitrary number, experience has shown that there is *some* justification for it." (Emphasis added). (App. J, pp. 9-11).

Ten years after the foregoing "Anti-Skid Row Ordinance" was enacted in reliance on the views of Councilmember Ravitz, the Council enacted Ordinance 742-G (App. G, p. 65), amending the Anti-Skid Row Ordinance by including "adult" theatres and bookstores and group "D" cabarets (topless) in the category of "regulated uses." No new statements of purpose or legislative findings accompanied the addition of adult bookstores and theatres to the "skid row" classification.

An "adult bookstore" is defined as "an establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals

which are distinguished or characterized by their emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Area,' (as defined below), or an establishment with a segment or section devoted to the sale or display of such material." "Specified Sexual Activities" and "Specified Anatomical Areas" are broadly defined to include, *inter alia*, "fondling" of the buttocks or female breasts as well as mere nudity (App. G, pp. 66-67).

At the same time, a new section was added, §66.0103, prohibiting the location of any adult bookstore, adult theatre, or class "D" cabaret within 500 feet of any building containing a residential, dwelling or rooming unit unless the prohibition was waived by the consent of 51% of the persons living or doing business within 500 feet of the proposed location (App. G, p. 69).[2]

In 1972, the City also enacted Ordinance 743-G (App. H, p. 80), amending the Detroit Municipal Code to require that adult theatres (although not adult bookstores) be licensed by the Mayor who was granted discretion to refuse to issue or to revoke licenses

> ". . . upon proof submitted to him of the violation by an applicant, or licensee, his agent or employee, within the preceding two years, of any criminal statute of the State, or of any ordinance

[2]The District Court held this provision unconstitutional, and the City did not appeal. Although the City subsequently amended the 500 foot provision to preclude adult theatres and bookstores within 500 feet of any "residentially zoned district" (App. I, p. 84), that ordinance was not before the District Court or the Court of Appeals, and, of course, is not before this Court.

> of this City regulating, controlling or in any way relating to the construction, use or operation of any of the establishments included in this article which evidences a flagrant disregard for the safety or welfare of either the patrons, employees, or persons residing or doing business nearby." (App. H, pp. 80-82).[3]

On May 1, 1973, Respondents AMERICAN MINI THEATRES, INC. and PUSSY CAT THEATRES OF MICHIGAN, INC. filed their Complaint in the District Court. The Complaint alleged that AMERICAN MINI THEATRES, INC is the lessee of certain property located in the City of Detroit on which it constructed a motion picture theatre which, on or about December 21, 1972, had passed all inspections required by the City of Detroit. PUSSY CAT THEATRES OF MICHIGAN, INC. was alleged to be the operator of the theatre pursuant to an agreement with AMERICAN MINI THEATRES, INC., and was alleged to have been operating the theatre as an adult-type theatre since January 5, 1973. The Complaint alleged that the City had refused to issue a certificate of occupancy for the theatre in reliance upon the provisions of Ordinances 742-G and 743-G. Respondents contended that the two ordinances are unconstitutional, *inter alia*, in that they inhibit and prohibit the display to adult persons of motion picture films protected under the First and Fourteenth Amendments to the United States Constitution, are

[3]The licensing provisions of Ordinance 743-G were attacked as unconstitutional in the Complaints filed by Respondents. However, the licensing provision was not discussed specifically either by the District Court or the Court of Appeals.

vague and overbroad thereby invading rights guaranteed by the First and Fourteenth Amendments, and deprive persons of the equal protection of the law contrary to the First and Fourteenth Amendments, by imposing restrictions on adult theatres which restrictions are not applicable to all other theatres. The Complaint prayed for declaratory and injunctive relief.

Petitioners moved for summary judgment, and the motion was consolidated for hearing with a similar motion filed in a similar action brought by Respondent NORTOWN THEATRE, INC. By stipulation, the two cases were heard on the same motions, briefs, and affidavits (App. M, p. 51).

In support of its motion, Petitioners submitted five affidavits and a memorandum from a policeman in the "Obscenity Detail." All of the affidavits and supporting exhibits deal exclusively with the provision prohibiting no more than two "regulated uses" within 1,000 feet.

1. Affidavit of Mel Ravitz (App. J, pp. 3-8).

After setting forth his qualifications as a member of the City Council, Professor of Sociology, and urban planner, Ravitz states his reasons for supporting the validity of the 1,000 foot provision, tracking almost verbatim the contents of his 1962 letter supporting the original Anti-Skid Row Ordinance. In so doing, Ravitz does not discuss specifically the relationship, if any, between adult bookstores and theatres and neighborhood blight. Instead, his analysis is a general one, lumping together adult bookstores and theatres with bars, motels, pawnshops, taxi-dance halls, and topless cabarets (App. J, p. 5). In the undifferentiated

analysis contained in his affidavit, as in his letter of ten years prior, Ravitz's central theme is that since people tend to believe that the "regulated uses" cause a neighborhood to deteriorate, their fears and apprehensions, even if unfounded in the first instance, will cause them to act in accordance with their prejudices, and neighborhood blight then becomes a self-fulfilling prophesy.

In Ravitz's analysis, the designated businesses are "symbols of decay and deterioration" (App. J, p. 6) which "leads people to believe the neighborhood is declining" (App. J, p. 5), and causes residents and businessmen to neglect their own property or to move away, leaving the neighborhood to the less respectable or less fortunate.

2. Memorandum From Police Officer Smith of the "Obscenity Detail" to Assistant Corporation Counsel Reilly Dated April 10, 1973 (App. J, p. 13).

This memorandum lists the "adult type businesses" by areas of the City, noting the "escalation" of adult bookstores and theatres "Since the Redrup decision, (Magna Carta for pornographers)." (App. J, p. 13).

3. Affidavit of William P. Walsh (App. J, p. 16).

Walsh's affidavit sets forth his qualifications as a realtor with experience in real estate appraisal and consulting services. The reasons stated by Walsh in support of the 1,000 foot restriction parallel those of Ravitz. In Walsh's opinion, the "regulated uses" tend to "create a concern and even hostility in the minds of the persons living and working nearby" and "act as a deterrent to prospective buyers of businesses

and residences within the area"; (App. J, p. 19); that the designated businesses are "associated in the minds of the prospective buyers with unstable and declining property values" (p. 20); that when it first appears that these types of businesses "are beginning to cluster in a neighborhood," nearby residents and businessmen who can afford to move "will immediately offer their property for sale"; and that "the anticipation whether or not warranted in fact is sufficient to and does cause the property owners to flee the area" (p. 20); that the appearance of more than one or two vacant storefronts or "for rent" signs in a business district, "creates an apprehension in the minds of the prospective buyers who reject the neighborhood as being unstable," and that other neighboring residents and businessmen believe their property values are in jeopardy and thus offer their homes and businesses for sale to " 'get out while the getting's good' " (p. 20); that the location of adult bookstores, adult theatres and "cabarets which offer topless dancing," because of the fact that they "cluster together," "within a very short time create in the minds of the adjacent residents and businessmen the same concern and hostility" which is evoked upon the appearance of the other "regulated uses." (p. 21).

To Walsh, as well as to Ravitz, the fear of and hostility to certain kinds of businesses in the minds of surrounding residents and businessmen, even if such fear and hostility is unfounded, is sufficient reason to limit the number of those businesses deemed offensive by existing residents on the basis of their personal prejudices.

4. Affidavit of Ogust Mai Stewart (App. J, p. 22).

Stewart's affidavit states that she and her husband are the owners of a real estate business located in an area of the City generally comprised of "banks, supermarkets, restaurants, typical gasoline stations, and other related service stores." (p. 22). She observes that during the past nine months "several pornography businesses have invaded" a two block section of the neighborhood; that "This two block strip is ablaze with multi-colored expensive neon signs that publicize a variety of offerings" and that "Shock, disgust and utter disbelief at the influx of this kind of business compels me to file this affidavit" (pp. 22-23); that "I cannot prove the point, but I am inclined to believe that some prurients' [sic] shops tend to draw sex deviates" (p. 23); that these businesses attract "undesirable persons" and turn away "desirable potential buyers" (p. 24); that these businesses "evoke an adverse reaction from the prospective buyer who believes that these businesses indicate a declining neighborhood" (p. 24); that "legitimate" business properties are thereby depreciated in value (p. 24).

Stewart's affidavit, aside from expressing her "shock" and "disgust" at the establishment of "pornography businesses" near her own business, restates the theory of self-fulfilling prophesy expounded by Ravitz and Walsh. Stewart's affidavit, just as Ravitz and Walsh's, states no facts concerning the alleged adverse impact of adult theatres and bookstores on a surrounding community other than those thought to flow from the unsupported fears and hostility of existing residents.

5. Letter From Carl H. Schmidt, Jr. to Mayor Gribbs Dated August 11, 1972 (App. J, p. 26).

Mr. Schmidt's letter advises the Mayor that he intends to move his company out of the City primarily because an adult bookstore has located next door. Mr. Schmidt asserts that the store has "pornography available in their back room" which he finds "disgusting" and states that he has "no desire to be this close to it or the people frequenting the store." (p. 26). Mr. Schmidt lists as additional reasons for his decision, the fact that his office and car were broken into and robbed on several occasions, and that "Detroit has a corporation tax and personal income tax, plus several other taxes which do not help the matter." (p. 27).

6. Letter From Mayor Gribbs to Carl H. Schmidt, Jr. Dated September 21, 1972 (App. J, p. 28).

Mayor Gribbs' answer to Mr. Schmidt's letter states that he shares Mr. Schmidt's concern regarding the "adverse effects" of adult bookstores; that he has established a "Task Force on Licensing Procedure" to review, enforce, and strengthen "our existing municipal codes in regard to legally defined obscenity and pornography"; that the task force has recently submitted to the Common Council a "package of sweeping new proposals to regulate and control adult bookstores and theatres"; that court cases are being reviewed to assist "in establishing effective enforcement of obscenity ordinances" (p. 28); and that the Mayor is sending an envoy to meet with Mr. Schmidt "to discuss our plan to abate this public nuisance." (p. 29).

7. Affidavit of Gail Sheehy (App. J, p. 29).

Sheehy's affidavit sets forth her qualifications as a journalist who has investigated and written about "the impact of the location of adult entertainment businesses in Manhattan, New York" (p. 30). Sheehy's theory is that prostitution and street crime result from the establishment of adult entertainment businesses. She espouses a domino theory in which "First appears the dirty bookstore," "Next follows the coin box peep show," "One day a live sex show sprouts from a storefront, then a massage parlor, then two massage parlors and a pornographic movie, two pornographic movies and a prostitution hotel" (pp. 30-31); eventually "The neighborhood is left in the grip of Mafia-backed massage parlor and hotel operators", "Murphy men, cruising pimps, prostitute muggers, youth gang ripoff artists and the addicts who lie in wait for any of the above, until they accumulate enough cash, and then jump them for a fix" (p. 31). Sheehy's ultimate concern, however, is with the prostitution and street crime which, in her opinion, emanates from massage parlors and prostitution hotels. The Detroit ordinances at issue do not designate as "regulated uses" massage parlors or similar businesses which have the potential for being fronts for prostitution, and Sheehy does not explain why it is necessary to limit the number of adult theatres and bookstores in order to prevent the establishment of massage parlors and prostitution hotels. Sheehy does not even contend, much less state facts to prove that the establishment of adult bookstores and theatres, as distinct from massage parlors and prostitution hotels, cause any of the "street crime" with which she is concerned.

8. Affidavit of Lino Canevaro (App. J, p. 37).

Canevaro's affidavit states that he is a head planner with the Detroit City Plan Commission and was in charge of the drafting of the present zoning ordinance. He states the bald conclusion, unsupported by any statement of facts or supporting reasoning, that "The commercial uses which have a tendency to create blighting conditions include: Bars, pawnshops, pool or billiard halls, shoeshine parlors, taxi-dance halls, secondhand stores, adult bookstores, adult theatres, and cabarets. The transient residential uses with this same potential includes: Public lodging houses (flop houses), motels, and hotels." (p. 38). The affiant asserts that when the "right mixture" of the foregoing uses are concentrated in a small area, a "skid row" results (p. 39). Canevaro then states that aside from the "deleterious appearance" usually associated with such an area, numerous social problems are generated by skid rows, including "the alcoholic, the drug addict, prostitution, crime, low rent housing for the single adult attracting senior citizens on a fixed income, the mission church, food kitchens, pan-handlers, and generally an assembly point for all the human derelicts of society." (p. 39).

In common with all the other affidavits, Canevaro's does not speak specifically to the question of whether adult bookstores and theatres, in particular, cause any ill effects upon the surrounding neighborhood, but rather describes a whole string of businesses generally deemed odious, and without any analysis includes adult bookstores and theatres in this benighted classification. It may well be that the deteriorated neighborhoods commonly known as "skid rows" do generate the "numerous social problems" specified by Canevaro, but the

affiant makes no attempt to establish the unlikely proposition that the location in a neighborhood of adult bookstores and theatres generates the social problems of alcoholism, drug addiction, or prostitution, much less the alleged social problems of low rent housing for senior citizens, mission churches, or food kitchens.

Respondents answered Petitioners' motion for summary judgment by contending that they, rather than Petitioners, were entitled to judgment as a matter of law (App. K, p. 40). In support of their answer, Respondents submitted the affidavit of James C. Rogers (App. K, p. 41). Rogers sets forth extensive qualifications as a real estate appraiser and consultant (pp. 41-44). Rogers states that he has read the affidavits of Ravitz, Walsh, and Stewart, and that each "pertains to the negative reactions of persons to the use or occupancy of adjacent real estate; that none of the affidavits contain any evidence of reduced market value of abutting properties due to the establishment of so-called 'adult' bookstores or theatres and the negative attitudes engendered thereby." (p. 44). Rogers states that there are many factors which have tended to, and will continue to, reduce property values in the City of Detroit, including racial and socioeconomic changes in neighborhoods, real estate financing, crime, city income tax, a defunct school system, etc. (p. 44); that it cannot be said that the establishment of an adult bookstore or theatre either has or will destroy a neighborhood or the values of the properties therein (p. 44). Rogers states that he has studied available data concerning sales of property in one of the areas of Detroit in which adult theatres and bookstores have located, and concludes that residential

values in the neighborhood have increased over the past two to two and a half years (pp. 44-45).

The consolidated motions for summary judgment came on for hearing in the District Court on September 17, 1973 before District Judges Kennedy and Gubow. At oral argument, counsel for the City argued that the ordinances in question were designed to curtail the establishment of theatres and bookstores dealing in sexually oriented material for the reason that existing criminal and civil remedies against obscenity, pursuant to the interpretive decisions of this Court, were insufficient to stop the sale and exhibition of such matter.

> "We know now that the Court has said that any material which is proven to be obscene may be entirely prohibited; and yet we must be realistic and face facts. It is only after such movies as 'Deep Throat' are actually found to be obscene that they may be prohibited.
>
> * * *
>
> "So 'Deep Throat' continues to be shown. The concern of the neighborhood over the showing of this kind of movie has been evidenced time and again by picketing, by calls and letters to our office, to the Mayor, to the Common Council and so on.
>
> * * *
>
> "And the City must take some kind of action. It cannot sit back and wait until this material is finally determined to be obscene or not.
>
> * * *
>
> "And yet we know that until these kinds of magazines are taken to court one by one, on a piece-meal basis, there is no way that we can stop the sale or dissemination of this kind of material." (App. L, pp. 47-49).

On March 22, 1974, the District Court filed an opinion in the consolidated cases upholding the validity of those portions of the ordinances which relate to the prohibition against two or more regulated uses within 1,000 feet, but declaring invalid those portions of the ordinances prohibiting such uses within 500 feet of a dwelling unit (App. D, p. 60). The order and judgment filed by the District Court were to the same effect (App. E, p. 61; App. F, p. 63).

Petitioners did not appeal from that portion of the judgment declaring invalid the prohibition of adult theatres and bookstores within 500 feet of a residential unit. Respondents appealed to the Court of Appeals for the Sixth Circuit from that portion of the judgment upholding the validity of those provisions of the ordinances prohibiting the establishment of more than two "regulated uses" within 1,000 feet. On June 16, 1975, the Court of Appeals issued its opinion holding the ordinances unconstitutional under the equal protection clause of the Fourteenth Amendment, because they impose burdens only on one category of theatres and bookstores, those selling and exhibiting "adult," albeit constitutionally protected materials and therefore discriminate against constitutionally protected books, magazines and films solely on the basis of their content (App. A, p. 15).

The Detroit authorities filed their Petition for Certiorari on August 28, 1975, and certiorari was granted on October 20, 1975.

Summary of Argument.

1. The provisions of the Detroit zoning ordinances limiting severely the locations available within the City for the establishment of "adult" theatres and bookstores deny Respondents the equal protection of the laws guaranteed by the Fourteenth Amendment. The ordinances create a classification of "adult" theatres and bookstores based solely upon the nonobscene contents of the media of communication sold or exhibited. Petitioners concede, as they must, that this classification of constitutionally protected expression based upon its content affects fundamental First Amendment interests of Respondents and the public generally and accordingly is subject to strict judicial scrutiny.

Because the ordinances on their face create a classification based upon the content of concededly protected expression, Detroit's scheme is not entitled to the usual presumption of validity, but the City rather must shoulder a heavy burden of justification to show that its classification is narrowly tailored to serve a compelling state interest and that it has selected means that do not unnecessarily burden constitutionally protected interests. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16-17 (1973).

Detroit contends that because its ordinances are enacted pursuant to its zoning power, they should be sustained pursuant to this Court's decision in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). In that case, however, the Court held that the zoning ordinance there involved did not affect fundamental constitutional rights and was not subject to strict judicial scrutiny. "Zoning," like all other labels of state law, can claim no talismanic immunity from constitutional limitation.

Detroit alleges that its zoning ordinances are designed to prevent adult theatres and bookstores from contributing to neighborhood blight and deterioration. The City contends such interest is not only legitimate, but compelling. But Detroit's abstract statement of its governmental interest must yield to a concrete analysis of the actual interests underlying these ordinances as revealed by the record in this case.

Respondents contend that an examination of the record establishes at best an interest in restricting unpopular speech deemed offensive by residents and businessmen on the basis of their unfounded and undifferentiated fears and apprehensions concerning the effect of adult theatres and bookstores on surrounding neighborhoods. At worst, the City's interest is no more than a naked desire to restrict by zoning sexually oriented expression that lies beyond the reach of the State's and City's criminal laws.

Petitioners admit that the ordinances were enacted largely upon the self-fulfilling prophesy theory espoused by Dr. Ravitz, and contained in the other affidavits as well, that in the absence of proof that adult bookstores and theatres themselves cause neighborhood blight, the City should nevertheless stop them from "clustering" because they evoke in the minds of surrounding residents and businessmen an image of "decay and deterioration," causing "concern and hostility," "shock, disgust and utter disbelief," all of which "rightly or wrongly" causes the neighboring citizens to react to their own preconceived notions.

Whatever the extent of state power to regulate unprotected obscenity on the basis of "unprovable assumptions" concerning the effect of obscenity on the "quality

of life," the "total community environment" and the "tone of commerce in the great city centers" (*Paris Adult Theatre I v. Slaton*, 413 U.S. at 63, 58), this Court always has condemned state action restricting protected speech where the alleged state interest is the protection of a non-captive audience from unpopular, controversial or offensive speech and where the basis of the state action is nothing more than undifferentiated fear and apprehension. The Court has been particularly critical of restrictions on speech based upon predictions of adverse consequences thought likely to flow from a broad category of expression, as opposed to such judgments made on an individualized basis. Simply because some citizens, or even a majority, have an unfounded fear that adult theatres and bookstores will blight a neighborhood is no justification for restricting the right of such businesses to locate in areas otherwise zoned for such commercial uses where sufficient patronage exists to sustain two or more such businesses. The fact, if it be a fact, that the mere presence of an adult bookstore or theatre in an area zoned to permit commercial establishments induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger cannot justify restricting the entry of the theatre or bookstore.

In short, a state has no legitimate interest, much less a compelling or substantial interest, in restricting the location of adult theatres and bookstores merely because residents are offended by their mere presence, perceive them as "symbols of decay and deterioration," and believe, without basis in fact, that they lead to neighborhood blight. Similar interests have been asserted to justify the exclusion of black citizens from white

neighborhoods, but this Court long ago refused to countenance discrimination for such reasons. *Buchanan v. Worley*, 245 U.S. 60 (1917).

In its Brief, Detroit urges another interest illegitimate on its face. It is contended that these zoning ordinances are necessary to limit the spread of adult theatres and bookstores which the City is unable to control by means of its criminal and civil obscenity laws. Such a state interest in censoring undesirable films and books, which have not been declared obscene, in a way which makes resort to the criminal laws dealing with obscenity largely unnecessary is not a legitimate interest. On the contrary, it is nothing more than a desire to establish prior restraint on freedom of expression without the necessary procedural safeguards.

Even if Detroit's alleged interest in preventing the "clustering" of adult theatres and bookstores on the basis of the public's undifferentiated fears and apprehensions concerning expression deemed offensive could be considered a legitimate state interest, such interest nevertheless is not sufficiently compelling or substantial to justify discriminating among classes of constitutionally protected expression solely on the basis of content. Government action which imposes restrictions or burdens on selective classes of expression on the basis of its content or message is the essence of censorship forbidden by constitutional principles of equal protection and freedom of speech and press. The decisions of this Court are legion in which governmental action restricting protected expression on the basis of its message has been condemned. Such discrimination is forbidden under the equal protection clause and the

First Amendment save in the most narrow and exceptional cases. The governmental interests asserted by Detroit in support of its discriminatory zoning ordinances are not the kind of compelling or substantial state interests which could justify such content-based classification.

Even if the interests asserted by Detroit as the objectives of the zoning ordinances could be deemed compelling or substantial, Detroit nevertheless has failed to sustain its heavy burden of proving such classification necessary to achieve the alleged interests. The means selected by Detroit are not narrowly tailored to achieve the state interests. The affidavits and exhibits submitted by the City in the District Court contain nothing more than sweeping generalizations plainly based on the adverse consequences of the concentrations of the "regulated" skid row businesses other than adult theatres and bookstores. None of the affidavits or exhibits contain any particularized showing that adult theatres and bookstores, as distinguished from flop houses, bars, pawnshops and the like, contribute in any manner whatsoever to the deterioration of surrounding neighborhoods. When a City attempts to impose restrictions upon a particular class of constitutionally protected speech solely on the basis of its content, its burden of proving that the classification is necessary to achieve a compelling state interest cannot be discharged by generalized statements of opinion such as Detroit has submitted here.

Not only is there no evidentiary basis to support Detroit's assertion that adult theatres and bookstores contribute to neighborhood blight, but empirical research funded and directed by the Commission on

Obscenity and Pornography created by the United States Congress suggests the absence of the alleged causal relationship.

In addition to the lack of factual support for Detroit's contention that adult theatres and bookstores cause neighborhood decay, the City's classification of "regulated uses" is both under-inclusive and over-inclusive. Detroit's principal witness, Dr. Ravitz, stated in 1962 when the "Anti-Skid Row" Ordinance was originally enacted, that all-night movies and drive-in theatres also must be controlled because "they, too, have the same undesirable image." Yet, the 1972 amendment failed to include all-night movies and drive-in theatres in the category of "regulated uses." These uses are distinguished by operational characteristics which might well contribute to a skid row atmosphere, independent of the content of the films exhibited. Yet they are not included. Similarly, massage parlors and other commercial establishments with potential for becoming places of prostitution were not included in the category of "skid row" uses, although massage parlors are prominently mentioned in one of the affidavits submitted by Petitioners in the District Court. Other uses identified in the affidavits as contributing to a skid row atmosphere, such as mission churches and rescue missions, are not included in the designation of "regulated uses." On the other hand, the inclusion of adult theatres and adult bookstores in the skid row category is unsupported by the evidence in the record. The City made no showing that adult theatres and bookstores properly belong in this category.

An additional interest is asserted by Detroit as underlying its classification. This additional interest ap-

pears in the City's Brief although it was not urged in the District Court and finds no support in the record. Thus, Petitioners suggest that the ordinances are intended to protect residential districts. But is it clear that the prohibition against more than two "regulated uses" within 1,000 feet of a proposed location was not designed to protect residential neighborhoods. Detroit already is zoned into residential, commercial and industrial areas, and the 1,000 foot provision is merely superimposed upon the basic zoning scheme. Nor can the ordinances be justified on any theory of protecting minors.

To the extent that any legislation is necessary to promote a compelling state interest in preventing adult theatres and bookstores from contributing to neighborhood blight, less drastic means are available which do not broadly stifle First Amendment interests. There are physical and operational characteristics of these and all other commercial establishments which may contribute to the appearance of neighborhood blight and resulting actual deterioration. Legislation aimed at improving the physical condition and appearance of public buildings can help prevent a skid row appearance without discriminating against any class of protected speech. Other narrowly tailored, nondiscriminatory legislation may be enacted.

2. The Detroit ordinances limiting severely the locations available within the City for the establishment of adult theatres and bookstores violate the free speech and press provisions of the First and Fourteenth Amendments.

In the first place, it must be emphasized that state power to restrict First Amendment interests is no greater

because exercised in the name of "zoning." It is the character of the right, not of the limitation, which governs the standard of judicial review. Zoning, like all of the various formulae for the repression of expression that have been challenged in this Court can claim no talismanic immunity from constitutional limitations, but must be measured by standards that satisfy the First Amendment. Thus, a mere showing of a legitimate state interst will not suffice to justify the ordinances, for even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. Precision of regulation must be the touchstone, and the least drastic means of satisfying even legitimate interests must be selected. The interest of the State in limiting First Amendment freedoms must be compelling.

Nor can the ordinances survive a First Amendment challenge merely because they restrict, but do not altogether prohibit, the locations available for the establishment of adult theatres and bookstores. First Amendment freedoms must not, in the guise of regulation, be abridged or denied. The decisions of the Court always analyze alleged "regulation" of First Amendment rights to determine the actual impact of the legislation, lest First Amendment freedoms be chipped away piece by piece. Legislation which directly burdens or deters protected expression will not be upheld merely because speech is not forbidden altogether. The fact of the matter is that the ordinances here impose a significant interference with the First Amendment interests of Respondents, other persons similarly situated, and the public generally. The ordinances severely restrict the locations available for the establishment of adult theatres and bookstores within the City. Because these severe

restrictions do not apply to theatres and bookstores generally, the ordinances constitute an effort by the City to determine the content of available expression. This is the essence of governmental censorship.

The zoning ordinances here must be analyzed as a direct abridgment of First Amendment interests, not as a regulation of non-speech elements in a course of conduct which only incidentally limits First Amendment interests. *United States v. O'Brien*, 391 U.S. 367 (1968) is not here applicable. In the first place, the present ordinances, unlike the statute in *O'Brien*, restrict First Amendment rights on their face. Secondly, even if it can be said that the establishment of an adult theatre or bookstore in a particular location is "conduct," nevertheless both the objective and operation of the ordinances is with the communicative aspect of the alleged conduct. In the present case, unlike *O'Brien*, the governmental interest in regulating the alleged conduct of establishing adult theatres and bookstores arises because the communication integral to the conduct is itself thought to be harmful. A statute which limits First Amendment interests on the basis of the content of expression never can be analyzed as a mere "incidental" restriction of free speech arising from governmental regulation of conduct intertwined with speech.

But even if the ordinances are analyzed as an "incidental" limitation on speech resulting from governmental regulation of a single course of conduct involving both speech and non-speech elements, the ordinances fail to satisfy the *O'Brien* tests. In the first place, the ordinances are not within the constitutional power of the Government. This is because Detroit's interest in preventing the "clustering" of adult theatres and

bookstores because of the public's undifferentiated fears and apprehensions concerning theatres and bookstores disseminating speech deemed offensive is not a legitimate state interest. Secondly, the interests principally asserted by Detroit are not so important, substantial, or compelling as to justify a restriction of First Amendment rights based solely on the content of expression. Thirdly, even if Detroit's interests are legitimate and compelling, the means selected have not been proved necessary to achieve the objectives. The City has failed to sustain its heavy burden of proving its content-based classification necessary to achieve the alleged interests. Moreover, the means selected are not narrowly tailored to achieve the objectives. Fourth, the interests asserted by Detroit are not unrelated to the suppression of free expression. Detroit's alleged interests arise because the "adult" communication integral to the "conduct" of establishing adult theatres and bookstores in particular locations is itself deemed harmful, and the state interests therefore are directly related to the restriction of First Amendment rights. Finally, Detroit's "incidental" restriction on First Amendment rights is greater than essential to the furtherance of its alleged governmental interests. To the extent any legislation is necessary to prevent adult theatres and bookstores from contributing to neighborhood blight, less drastic means are available which do not broadly stifle First Amendment interests.

The zoning ordinances cannot be upheld as time, place, or manner regulations because they discriminate against one class of expression on the basis of content. The Court consistently has held that valid time, place or manner regulations of speech must be neutral and cannot impose restraints on the basis of the content of expression.

The zoning ordinances cannot be upheld under a theory of protecting a "captive audience." This alleged interest, asserted by Petitioners for the first time in their Brief, is totally without foundation. The ordinances do not regulate the manner in which adult theatres or bookstores may operate, but rather limit their ability to locate within a specified distance from other "regulated uses." The ordinances are not directed at any alleged thrusting of offensive communication upon persons unable to avoid exposure. Nor is there here any issue of whether a public forum for First Amendment activity has been established.

The zoning ordinances cannot be justified as a governmental effort to protect minors from sexually oriented materials. The ordinances are not directed to preventing the establishment of adult theatres and bookstores in locations where children are likely to congregate. Nor is the 1,000 foot provision in any way designed to "protect" exclusively residential neighborhoods. The present ordinances do not reveal a limited and focused state concern to shield juveniles from sexually explicit matter.

Finally, the waiver provisions of §66.0101 do not save the ordinances because the Commission's authority to waive the 1,000 foot provision is wholly discretionary, and lacking in narrow and definite standards.

3. Detroit ordinance 743-G, requiring adult theatres to be licensed by the Mayor but permitting the Mayor to refuse such license on the basis of broad and indefinite standards, and lacking any procedural safeguards, constitutes an impermissible prior restraint of First Amendment rights and further deprives persons desiring to operate adult theatres of the equal protection of the laws, contrary to the First and Fourteenth Amend-

ments. The ordinance requires adult theatres, but not adult bookstores or theatres generally, to be licensed by the Mayor. The Mayor is granted discretion to refuse to issue a license, and to revoke any license already issued, on the basis of standards which are so broad and imprecise as to permit unbridled prior censorship. The ordinance permits the Mayor to deny a license because any employee of the applicant has violated a city ordinance which, in the Mayor's opinion, "evidences a flagrant disregard" for the public welfare. Such broad discretion in administrative licensing schemes affecting First Amendment rights frequently have been condemned by the Court.

In addition, the licensing scheme contains none of the procedural safeguards required by this Court where such schemes operate as a prior restraint of free speech. See, *Freedman v. Maryland*, 380 U.S. 51 (1965). The Michigan state courts have not construed the ordinance to provide the necessary procedural safeguards, and this Court lacks jurisdiction to read the *Freedman* requirements into a municipal ordinance.

Further, Detroit not only has singled out "adult" theatres from all other theatres in imposing a license requirement, but it further has distinguished between adult theatres and adult bookstores, the latter not being required to be licensed. Yet the record contains not so much as a suggestion as to why only adult theatres need be licensed any more than theatres generally, or why if the "adult" nature of the material is determinative adult bookstores are exempted. The conclusion necessarily follows that Detroit's conduct in singling out adult theatres is an invidious discrimination in violation of the equal protection clause.

ARGUMENT.

I.

The Detroit Ordinances, 742-G and 743-G, Which Limit Severely the Locations Available Within the City for the Establishment of "Adult" Theatres and Bookstores Deny Respondents the Equal Protection of the Laws Guaranteed by the Fourteenth Amendment Because the Ordinances Classify and Impose Restrictions Upon Theatres and Bookstores Disseminating Constitutionally Protected Expression Solely on the Basis of the Content of the Expression, Which Classification Is Not Necessary to Further Any Compelling State Interest, and Is Not Even Rationally Related to Any Legitimate State Interest.

A. The "Inverse Zoning" Ordinances Create a Classification of "Adult" Theatres and Bookstores Based Solely Upon the Nonobscene Content of the Media of Communication Sold or Exhibited. This Classification of Constitutionally Protected Expression Based Upon Content Affects Fundamental First Amendment Interests of Respondents and the Public Generally and Thus Is Subject to Strict Judicial Scrutiny; The City Has the Burden of Proving the Classification Necessary to Promote a Compelling State Interest.

Both the majority and the dissenting opinions in the Court of Appeals agree that Detroit's attempt to limit the locations available for the establishment of "adult" theatres and bookstores affects First Amendments interests. The City itself concedes that "it is regulating the manner in which material, presumably protected by the First Amendment, may be disseminated." (Pets. Br., p. 23). The City further concedes that "The equal protection clause requires that statutes affecting First Amendment interests be narrowly tai-

lored to their legitimate objectives. *Williams v. Rhodes,* 393 U.S. 23, 21 L.Ed.2d 24, 89 S.Ct. 5 (1968)." (Pets. Br., p. 53). The City's concessions, of course, are compelled by the language of the ordinances and the decisions of this Court reviewing legislative classifications affecting fundamental interests protected by the Federal Constitution.

There is no dispute that the ordinances restrict the locations available for the establishment only of those theatres and bookstores classified as "adult," and that the ordinances' definition of "adult" is based solely upon the content of the books, magazines or films sold or exhibited. It is also undisputed that the definition of "adult" is broader than the class of unprotected obscenity which the States may regulate without having to justify the regulation as anything more than a rational means of achieving a legitimate state interest. See, *Miller v. California,* 413 U.S 15 (1973); *Paris Adult Theatre I v. Slaton,* 413 U.S. 49 (1973). It is established that "The setting of the bookstore or the commercial theatre" is "each presumptively under the protection of the First Amendment" [*Roaden v. Kentucky,* 413 U.S. 496, 504, 93 S.Ct. 2796 (1973)] and that material frankly describing or depicting nudity and sexual activity is as fully protected from governmental restraint as all forms of pure speech, unless the material falls within the narrow category of obscenity. See, *Roth v. United States,* 354 U.S. 476 (1957); *Jenkins v. Georgia,* 418 U.S. 153 (1974). Further, this Court's recognition of state power to regulate the dissemination of obscenity, properly defined, implies no recognition of state power to restrict the dissemination to the general public of sexually oriented publications and

films which are not obscene. *Smith v. California*, 361 U.S. 147, 152 (1959); *Marcus v. Search Warrants of Property*, 367 U.S. 717, 730 (1961).

Because the ordinances on their face create a classification based upon the content of protected expression, the City bears the heavy burden of justifying the classification under the strict scrutiny standard of judicial review under the equal protection clause. See, *Williams v. Rhodes*, 393 U.S. 23 (1968); *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 16, 34, n.75 (1973); *Storer v. Brown*, 415 U.S. 724 (1974); *Lubin v. Panish*, 415 U.S. 709 (1974); *Erznoznik v. City of Jacksonville*, ... U.S. ...., 95 S.Ct. 2268, 2275-2276 (1975); *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 451 (1974) (concurring opinion of Mr. Justice Powell).

Thus, in *San Antonio Independent School District v. Rodriguez, supra*, 411 U.S. at 16, the Court stated that "strict judicial scrutiny" is the appropriate standard for reviewing legislative judgments "that interfere with fundamental constitutional rights," and the Court noted that the strict standard of review was appropriately applied to the ordinance involved in *Police Department of the City of Chicago v. Mosley, supra*, since the ordinance was one " 'affecting First Amendment interests' " (411 U.S. at 34, n.75). The applicable standard of review was described by the Court in *San Antonio*, 411 U.S. at 16-17:

> " . . . strict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a 'heavy burden of justification,' that

> the State must demonstrate that its . . . system has been structured with 'precision,' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the 'less drastic means' for effectuating its objectives. . . ."

See also, *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 262-263 (1974) [State bears "heavy burden of justification" to establish that classification burdening fundamental constitutional rights serves compelling state interest and that State "has chosen means that do not unnecessarily burden constitutionally protected interests"]; *Erznoznik v. City of Jacksonville*, ... U.S. ...., 95 S.Ct. 2268, 2277 (1975) [Classification affecting First Amendment interests must satisfy "rigorous constitutional standards"; "precision of drafting and clarity of purpose are essential"].

Accordingly, Respondents turn to an analysis of whether Detroit can satisfy its heavy burden of justifying this legislative classification of protected expression on the basis of its content.

B. Detroit's Interest in Preventing the "Clustering" of Adult Theatres and Bookstores Because of the Public's Undifferentiated Fears and Apprehensions Concerning Theatres and Bookstores Disseminating Speech Deemed Offensive Is Not a Legitimate, Much Less a Compelling or Substantial, Governmental Interest.

1. Detroit seeks to cloak its content-based classification in the protective mantle of zoning, one of the States' police powers long recognized as legitimate. Thus, the City relies upon this Court's decisions upholding zoning ordinances in *Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926); *Berman v. Parker*,

348 U.S. 26 (1945), and *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). But none of these decisions involved a zoning ordinance affecting fundamental constitutional rights. See, *e.g.*, *Village of Belle Terre, supra*, 416 U.S. at 7 [The ordinance "involves no 'fundamental' right guaranteed by the Constitution"]. Accordingly, the zoning ordinances there involved were upheld merely as rational means of furthering legitimate state objectives. None of the Court's zoning decisions stand for the proposition that zoning ordinances enjoy any special immunity from the rigorous standards of judicial review applicable where legislative classifications affect fundamental First Amendment interests. "Zoning," no more than "libel" or any other "mere labels" of state law, can claim any talismanic immunity from constitutional limitations. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

The City asserts that its zoning ordinances are designed to achieve two legitimate governmental purposes, which it contends are compelling:

> "1. To avoid clustering of adult businesses and reasonably restrict the number of regulated uses which may locate in any business district serving a neighborhood;
>
> "2. To insure the continued support and commitment to the neighborhood of those persons presently residing and doing business therein." (Pets. Br., p. 9).

Stated abstractly, a governmental interest in preventing urban blight and neighborhood deterioration is undoubtedly legitimate. But even in cases not requiring strict judicial scrutiny, "This Court need not in equal protec-

tion cases accept at face value assertions of legislative purposes. . . ." *Weinberger v. Wisenfeld*, ... U.S. ...., 95 S.Ct. 1225, 1233, n.16 (1975). "But the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Id.*, 95 S.Ct. at 1233. The City's abstract statement of its governmental interests must yield to a concrete analysis of the interests underlying these ordinances as revealed by the record in this case.

Respondents contend that an examination of the record herein establishes at best an interest in restricting unpopular speech deemed offensive by residents and businessmen on the basis of their unfounded and undifferentiated fears and apprehensions concerning the effect of adult theatres and bookstores on surrounding neighborhoods. At worst, the City's interest is no more than a naked desire to restrict by zoning sexually oriented expression that lies beyond the reach of the State's and City's criminal and civil obscenity laws.

2. Petitioners concede that "In enacting these ordinances much reliance was placed on the testimony of sociologist Dr. Mel Ravitz, Professor of Sociology, Wayne State University, and former President of the Common Council, City of Detroit (App. J, pp. 3-8)." (Pet. Br., p. 18). Ravitz's affidavit, together with the affidavits of Walsh and Stewart, are premised upon an alleged "basic sociological axiom":

> "if people believe something is true even if it is not originally, they will tend to act as if it were true and in so doing help produce the condition that was originally only believed. If residents of any neighborhood believe that the

> concentration of the proscribed uses damage the neighborhood they will act as if it were true and will seek to move away and allow in people with different standards; they will allow their property to decline, they will not engage in the full range of conservation attitudes and activities so necessary to the maintenance of a healthful residential neighborhood." (App. J, p. 5; Pets. Br., p. 19).

Ravitz nowhere contends that the "clustering" of adult theatres and bookstores in a neighborhood causes any demonstrable ill effects other than appearing "rightly or wrongly" as "symbols of decay and deterioration" (App. J, p. 6) which "leads people to believe the neighborhood is declining" (App. J, p. 5) and that "It matters not what the cause of this shaken confidence, whether it is a legitimate or phony cause." (App. J, p. 6).

The affidavit of William P. Walsh is in the same vein, alleging that the "clustering" of "regulated uses," including adult theatres and bookstores, causes nearby residents and businessmen to "anticipate" a decline in property values which "anticipation whether or not warranted in fact is sufficient to and does cause the property owners to flee the area" (App. J, p. 20); that adult bookstores and theatres "create in the minds of the adjacent residents and businessmen the same concern and hostility which is evoked upon the appearance of the other businesses classified as regulated uses." (App. J, p. 21).

The affidavit of Ogust Mai Stewart (App. J, p. 22) refers to her "shock, disgust and utter disbelief" at the "invasion" of "pornography businesses" in her

community (App. J, pp. 22-23). Stewart alleges, without the slightest factual support, that the impact of "these businesses" on a neighborhood consists of "the attraction of undesirable persons and the turning away of desirable potential buyers." (App. J, p. 24).

Petitioners admit (Br., pp. 18-19) that the ordinances were enacted upon the self-fulfilling prophesy theory espoused by Dr. Ravitz—that in the absence of proof that adult bookstores and theatres themselves cause neighborhood blight, the City should nevertheless stop them from "clustering" because they evoke in the minds of surrounding residents and businessmen an image of "decay and deterioration," causing "concern and hostility," "shock, disgust and utter disbelief," all of which "rightly or wrongly" causes the neighboring citizens to react to their own preconceived notions.

Whatever the extent of state power to regulate unprotected obscenity on the basis of "unprovable assumptions" concerning the effect of obscenity on the "quality of life," the "total community environment," and the "tone of commerce in the great city centers" (*Paris Adult Theatre I v. Slaton, supra,* 413 U.S. at 63, 58), this Court always has condemned state action restricting protected speech where the alleged state interest is the protection of a non-captive audience from unpopular, controversial or offensive speech and where the basis of the state action is nothing more than undifferentiated fear and apprehension.

Thus, even the very real fear that an audience may react violently to a speaker's controversial views is no justification for limiting his speech except where it is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Brandenberg v. Ohio, 395 U.S. 444 (1969).[4] This Court has condemned state efforts "selectively to shield the public from some kinds of speech on the ground that they are more offensive than others" except in the extremely limited instances when the speaker intrudes on the privacy of the home or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure. *Erznoznik v. City of Jacksonville, supra*, 95 S.Ct. at 2272-2273.

An asserted state interest in protecting a neighborhood from the exodus of residents offended by the action of a home owner in hanging an American flag with a peace symbol attached to it out of his window would not justify legislation precluding such activity. See, *Spence v. Washington*, ... U.S. ...., 94 S.Ct. 2727, 2731 (1974). Speech which is merely vulgar, offensive, or even repulsive is nonetheless protected. See, *e.g., Old Dominion, etc. v. Austin*, ... U.S. ...., 94 S.Ct. 2770, 2781 (1974) ["The most repulsive speech enjoys immunity provided it falls short of deliberate or reckless untruth"]; *Louis v. City of New Orleans*, 415 U.S. 130, 134 (1974) [Conviction under overbroad ordinance for yelling at police officer "You god damn mother fucking police" reversed; "Vulgar or offensive" speech protected by First Amendment]; *Hess v. Indiana*, 414 U.S. 105 (1973) [Disorderly conduct conviction for stating "We'll take the fucking street later (or again)" spoken while facing

[4]In *Brandenberg*, the Court reversed the criminal conviction under Ohio's Criminal Syndicalism Statute of a Ku Klux Klan member who spoke at a Klan rally stating, among other things: "This is what we are going to do to the niggers"; "a dirty nigger"; "Send the Jews back to Israel"; "Bury the niggers"; "Nigger will have to fight for every inch he gets from now on." (395 U.S. at 446).

crowd at anti-war demonstration while sheriff and deputies were attempting to clear street reversed—words could not be punished either as obscene, as fighting words, as speech amounting to public nuisance in that privacy interests were being invaded, or as advocacy directed to inciting or producing imminent lawless action and likely to do so]; *Papish v. Board of Curators of University of Missouri*, 410 U.S. 667, 670 (1973) [Expulsion of state university student for distributing "indecent" newspaper on campus not justified by any exception to First Amendment protection—"the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"]; *Gooding v. Wilson*, 405 U.S. 518, 527 (1972); *Cohen v. California*, 403 U.S. 15, 18-22 (1971); *Street v. New York*, 394 U.S. 576, 592 (1969); *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949). Cf., *Procunier v. Martinez*, ... U.S. ...., 94 S.Ct. 1800, 1812 (1974) [Even substantial governmental interest in censoring prisoners' mail to preserve prison order and discipline, maintenance of security against escape or unauthorized entry, and rehabilitation of prisoners does not justify broad regulations authorizing censorship of statements that "unduly complain," "magnify grievances," express "inflamatory political, racial, religious or other views," and matter deemed "defamatory"].[5]

[5]Although the States lack power to restrict speech merely on the basis that some find it offensive, vulgar, or repulsive, the States undoubtedly have power to regulate the physical appearance of public buildings to prevent a tawdry or dilapidated condition which could contribute to neighborhood blight. The ordinances here, however, are not tailored to serve this interest.

3. Not only has the Court refused to recognize the legitimacy of state interests in protecting citizens from offensive, unpopular, or controversial speech, the Court also has condemned state action abridging First Amendment interests in pursuit of legitimate objectives but where the basis for the abridgment was mere undifferentiated fear and apprehension that adverse effects actually would occur. The Court has been particularly critical of restrictions on speech based upon predictions of adverse consequences thought likely to flow from a broad category of speech, as opposed to such judgments made on an individualized basis. Thus, in *Police Department of City of Chicago v. Mosley*, 408 U.S. 92 (1972), the Court rejected the City's argument that, although it permits peaceful labor picketing near a school, it may prohibit all non-labor picketing "because, as a class, nonlabor picketing is more prone to produce violence than labor picketing." (408 U.S. at 100).

> "Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter. Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis. '[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.' Tinker v. Des Moines Independent Community School District, 393 U.S. at 508, 89 S.Ct. at 737." (408 U.S. at 100-101).

In *Cox v. Louisiana*, 379 U.S. 536 (1965), the Court reversed state convictions under a disturbing the peace statute arising out of a civil rights demonstration. The Court held that the statute, as construed and applied, allowed demonstrators to be punished merely for peacefully expressing unpopular views. The Court rejected the views of the trial judge who thought it was "inherently dangerous" and an "inherent breach of the peace" to bring 1,500 black persons into the predominantly white business district in the City of Baton Rouge, to congregate across the street from the courthouse, to sing songs with lines such as "black and white together" and to urge the 1,500 demonstrators to descend upon lunch counters and sit there until they are served (379 U.S. at 549-550). The Court also rejected the State's contention that the convictions should be sustained because of the fear expressed by some of the state witnesses that "violence was about to erupt" because of the demonstration. (379 U.S. at 550). The Court found these arguments untenable because

> "Here again, as in Edwards [v. South Carolina, 372 U.S. 229], this evidence 'showed no more than that the opinions which [the students] were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection.' [citation omitted]. Conceding this was so, the 'compelling answer * * * is that constitutional rights may not be denied simply because of hostility to their assertion or exercise.' Watson v. City of Memphis, 373 U.S. 526, 535, 83 S.Ct. 1314, 1320, 10 L.Ed.2d 529." (379 U.S. at 551).

In rejecting the contentions of the State, the Court relied upon *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5, which held that the very function of free speech under our system of government is to invite dispute; that it may best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger; that speech properly may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea; that there is no room under the First Amendment for "standardization of ideas" by "dominant political or community groups." Thus, in *Terminiello*, convictions under a breach of the peace statute were reversed because the trial judge charged that defendant's speech could be punished "if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm." (337 U.S. at 3).

By the same token, simply because "dominant community groups" have an unfounded fear that adult theatres and bookstores will blight a neighborhood is no justification for restricting the right of such businesses to locate in areas otherwise zoned for such commercial uses where sufficient partonage exists to sustain two or more such businesses. The fact, if it be a fact, that the mere presence of an adult bookstore or theatre in an area zoned to permit commercial establishments "induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger" cannot justify restricting the entry of the theatre or bookstore. See also, *Healy v. James*,

408 U.S. 169, 189-190, 191 (1972) [Refusal of state college president to grant official campus recognition to local chapter of Students for a Democratic Society not justified by unsupported fear that group would cause disruption]; *Cohen v. California*, 403 U.S. 15, 23 (1971) [Fear that person wearing jacket bearing words "Fuck the Draft" "inherently likely to cause violent reaction" does not justify prohibiting such expression].

This Court also has held that where a legislative classification affects fundamental constitutional interests, the classification cannot be sustained upon the State's contention that because the public believes the classification is necessary, the State is entitled to act upon that belief. In *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), the Court held that a one-year residency requirement in a county before persons became eligible to receive non-emergency care at county expense violated the equal protection clause because the classification penalized the fundamental constitutional interest in interstate mobility and the county failed to meet its heavy burden of showing a compelling state interest and the utilization of the least drastic means. The Court rejected the argument that "whether or not the durational residence requirement actually deters migration, the voters think that it protects them from low income families' being attracted by the county hospital; hence, the requirement is necessary for public support of that medical facility." (415 U.S. at 266-267).

Moreover, the Court has rejected legislative classifications based upon assumptions of fact which are little more than prejudices and stereotyped generaliza-

tions. In *Stanton v. Stanton*, ... U.S. ....., 95 S.Ct. 1373 (1975), the Court held that a state statute specifying for males a greater age of majority than for females in the context of parents' obligation for support payments for their children was a denial of equal protection even under the rational basis standard. The state court had held the classification justified by certain "old notions" concerning the respective roles of men and women in society. This Court rejected these "old notions," stating that it is unwilling to accept the "unquestioned truth" of these stereotypes. (95 S.Ct. at 1378).

Respondents contend, in short, that a State has no legitimate interest, much less a compelling or substantial interest, in restricting the location of adult theatres and bookstores merely because residents are offended by their mere presence, perceive them as "symbols of decay and deterioration," and believe, without basis in fact, that they lead to neighborhood blight. The States cannot whittle away First Amendment freedoms merely because some citizens, or even a majority, entertain preconceived but unproved beliefs so strongly held that they will act on the basis of such prejudices. If Government can restrict the locations available to adult theatres and bookstores on the basis of these interests, it can as easily provide that no more than two black persons may reside ("cluster") in an otherwise all-white neighborhood because the white residents believe, "rightly or wrongly," that an influx of black persons will cause neighborhood blight, and the white residents and businessmen will have their confidence in the neighborhood shaken, and will begin to move out or neglect their property, thus causing the initially

unfounded notions to become reality. The intolerable consequences of such reasoning was perceived by this Court in 1917 when it struck down as a denial of equal protection a city ordinance preventing the occupancy of a residence by a black person in any block where the majority of residents were white. *Buchanan v. Worley*, 245 U.S. 60.

In *Buchanan*, the City argued that the ordinance "tends to promote the public peace by preventing racial conflict," and "prevents the deterioration of property owned and occupied by white people, which deterioration . . . is sure to follow the occupancy of adjacent premises by persons of color." (245 U.S. at 73-74). The Court found these state interests insufficient:

> "That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges." (245 U.S. at 80-81).

4. In its brief, the City urges another interest illegitimate on its face. The City states that this Court's decision in *Redrup v. New York*, 386 U.S. 767 (1967), and the decision of the Michigan Supreme Court in *People v. Bloss*, 388 Mich. 409 (1972) "opened the gates for a burgeoning business in 'adult' types of entertainment" and that the "entrepreneurs in pornography immediately took advantage of the situation" (Pets. Br., p. 19). The City contends that these zoning ordinances are necessary to limit the spread of adult

theatres and bookstores which the City is unable to control by means of its criminal and civil obscenity laws. Thus, the City states that "There remains the very real problem of controlling the influx of adult businesses whose stock in trade . . . are entitled to display and/or distribution before any judgment may be made as to whether the material offered is pornographic"; that "continued and repeated convictions for disseminating pornographic material will not close those business establishments which are the continuing, visible sources of material which is offensive to the neighboring business and residential community, whether or not the material has been legally determined to be pornographic." (Pets. Br., pp. 22-23).

The same argument was made in the District Court where the City contended that it "must take some kind of action. It cannot sit back and wait until this material is finally determined to be obscene or not"; that "Until these kinds of magazines are taken to court one by one, on a piecemeal basis, there is no way that we can stop the sale or dissemination of this kind of material." (App. L, pp. 48-49). Such a state interest in censoring undesirable films and books, which have not been declared obscene, in a way which makes resort to the criminal laws dealing with obscenity largely unnecessary is not a legitimate interest. It is, rather, nothing more than a desire to establish prior restraint on freedom of expression without the necessary procedural safeguards. See, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Southeastern Productions, Ltd. v. Conrad*, ... U.S. ...., 95 S.Ct. 1239 (1975).

C. Even if Detroit's Alleged Interest in Preventing the "Clustering" of Adult Theatres and Bookstores Together With Other "Regulated Uses" on the Basis of the Public's Undifferentiated Fears and Apprehensions Concerning Expression Deemed Offensive Could Be Considered a Legitimate State Interest, Such Interest Nevertheless Is Not Sufficiently Compelling or Substantial to Justify Discrimination Among Classes of Constitutionally Protected Expression Solely on the Basis of Content.

1. Governmental action which imposes restrictions or burdens on selected classes of expression on the basis of its content or message is the essence of censorship forbidden by constitutional principles of equal protection and freedom of speech and press. "The right to use a public place for expressive activity may be restricted only for weighty reasons. . . . Clearly, Government has no power to restrict such activity because of its message." *Grayned v. City of Rockford* 408 U.S. 104, 115 (1972). In *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972), the Court held violative of the equal protection clause an ordinance which prohibited all forms of peaceful picketing within 150 feet of any primary or secondary school building but permitted peaceful labor picketing within 150 feet of the school. The fact that nonlabor picketing still could be conducted across the street from the school (408 U.S. at 93, n.1) did not save the ordinance. The Court stated that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. [citations omitted]." (408 U.S. at 95).

> "The essence of this forbidden censorship is content control. Any restriction on expressive activity

> because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' New York Times Company v. Sullivan, supra, 376 U.S. at 270, 84 S.Ct. at 721." (408 U.S. at 96).

The Court stated that both under the equal protection clause and the First Amendment "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." (408 U.S. at 96). The Court noted that it has frequently condemned such discrimination among different users of the same medium for expression in such cases as *Niemotko v. Maryland*, 340 U.S. 268 (1951) and *Fowler v. Rhode Island*, 345 U.S. 67 (1953). Similarly, the Court observed that in its many decisions condemning licensing schemes lodging broad discretion in public officials to grant or deny permits for speech-related activity, the vice of the licensing schemes was their potential use as instruments for selectively suppressing unpopular points of view. See, cases cited at 408 U.S. 97.

In *Mosley*, as in the present case, the ordinance itself described restricted speech-related activity "not in terms of time, place, and manner, but in terms of subject matter." Such an ordinance " 'thus slip[s] from the neutrality of time, place, and circumstance into a concern about content.' This is never permitted." (408 U.S. at 99).

In *Miami Herald Publishing Company v. Tornillo*, ... U.S. ...., 94 S.Ct. 2831 (1974), the Court held that a state statute requiring a newspaper which assails the character of a political candidate to afford free space to the candidate for reply violates the First Amendment. The Court stated that the decisions of a newspaper concerning its content constitute the exercise of editorial control and judgment, and "It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." (94 S.Ct. at 2840). Mr. Justice White, concurring, stated that "A newspaper or magazine is not a public utility subject to 'reasonable' governmental regulation in matters affecting the exercise of journalistic judgment as to what shall be printed." (94 S.Ct. at 2840).

In *Pell v. Procunier*, ... U.S. ...., 94 S.Ct. 2800 (1974), the Court upheld a prison regulation barring media representatives from personally interviewing selected inmates and preventing prisoners from initiating press interviews, noting that "This is not a case in which the selection [of persons who are permitted to visit prisoners] is based on the anticipated content of the communication between the inmate and the prospective visitor." (94 S.Ct. at 2805). The Court stated that "So long as this restriction operates in a neutral fashion, without regard to the content of the expression, it falls within the 'appropriate rules and regulations' to which 'prisoners necessarily are subject.' . . . ." (94 S.Ct. at 2807).

In *Papish v. Board of Curators of University of Missouri*, 410 U.S. 667 (1973), the Court held imper-

missible under the First Amendment the expulsion of a state university student for distributing an "indecent" newspaper on campus where the expulsion was based on "the disapproved *content* of the newspaper rather than the time, place, or manner of its distribution."

> "Since the First Amendment leaves no room for the operation of the dual standard in the academic community with respect to the content of speech, and because the state university's action here cannot be justified as a nondiscriminatory application of reasonable rules governing conduct, the judgments of the courts below must be reversed." (410 U.S. at 670-671) (Emphasis in original).

See also, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 510-511 (1969) [Public school authorities impermissibly singled out only black armbands worn as anti-war symbols for prohibition and not all symbols of political or controversial significance]: *Bigelow v. Virginia*, ... U.S. ...., 95 S.Ct. 2222, 2237 (1975) (Rehnquist, J., dissenting) [". . . we have always refused to distinguish for First Amendment purposes on the basis of content. . . ."].

In *Erznoznik v. City of Jacksonville*, ... U.S. ...., 95 S.Ct. 2268 (1975), the Court held a city ordinance prohibiting the showing of films containing nudity in drive-in theatres when the screen is visible from a public street or place abridged the exercise of freedom of speech. The ordinance "discriminates among movies solely on the basis of content." (95 S.Ct. at 2273).

The Court condemned the City's attempt "selectively to shield the public from some kinds of speech on the ground that they are more offensive than others," citing *Police Department of Chicago v. Mosley, supra*, 95 S.Ct. at 2272. The Court noted that the only instances in which such "selective restrictions" have been upheld were when the speaker intrudes on the privacy of the home (*Rowan v. Post Office Department*, 397 U.S. 728 (1970)), or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure (*Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)). (95 S.Ct. at 2272-2273). Absent these two "narrow circumstances" in which "'substantial privacy interests are being invaded in an essentially intolerable manner'" (*Cohen v. California*, 403 U.S. at 21), "the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." (95 S.Ct. at 2273).

The principle that emerges from the foregoing decisions is that governmental discrimination among types of protected expression on the basis of the content of the expression, together with governmental attempts to influence the content of the media of communication, are forbidden under the equal protection clause and the First Amendment, save in the most narrow and exceptional cases. Plainly, the governmental interests asserted by Detroit in support of its discriminatory zoning ordinance, discussed above, are not the kind of compelling or substantial state interests which could justify such content-based classification.

2. Petitioners rely on *Lehman v. Shaker Heights*, 418 U.S. 298 (1974); *Cox v. Louisiana*, 379 U.S. 559 (1965); *Cox v. New Hampshire*, 312 U.S. 569 (1941), and *Grayned v. City of Rockford*, 408 U.S. 104 (1972) for the proposition that classifications of expresion on the basis of content have been held permissible. See, Brief for Petitioners, pp. 35-38, 52-53. Petitioners' reliance on these cases is totally misplaced. In *Lehman*, a city's policy refusing all political advertising in city buses while permitting commercial advertising was held to violate neither the First Amendment nor the equal protection clause. Four Justices joined the plurality opinion on the ground that the City's mere acceptance of innocuous commercial advertising did not create a public First Amendment forum on the city buses. Justice Douglas concurred on the ground that the petitioner, a political candidate, had no constitutional right to force his message upon a captive audience. The four Justices who dissented did so on the ground that by accepting commercial advertising, the City had established a public forum for the expression of speech and it followed that discrimination on the basis of content was impermissible. All members of the Court appeared to agree that once a public forum for communication has been established, both free speech and equal protection principles prohibit discrimination based solely upon subject matter or content.

Petitioners' suggestion that neighbors of adult bookstores and theatres, whose contents are sold or exhibited

only to those wishing to purchase or view them, somehow constitute a captive audience (Pets. Br., pp. 35-36) is incomprehensible and finds no support in the decisions of this Court.

Grayned v. City of Rockford, supra, not only offers no support for Petitioners' proposition that discrimination on the basis of content is permitted, but in fact condemns content-based classifications. See, 408 U.S. at 113, 115. Similarly, *Cox v. Louisiana, supra*, condemned discrimination on the basis of content, stating that Government cannot have discretion "to pick and choose among expressions of view" those which will be permitted and those which will not (379 U.S. at 569). The state statute upheld in *Cox v. Louisiana* prohibited all picketing, regardless of message or content, in or near a courthouse with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness or court officer in discharge of his duty. In *Cox v. New Hampshire, supra*, the Court merely upheld as a neutral, nondiscriminatory time, place and manner regulation, a state statute prohibiting all parades upon a public street, regardless of message or content, without a license. As construed by the state court, the statute precluded undue discrimination in granting or refusing licenses and prohibited "unfair discrimination" in the grant or denial of licenses (312 U.S. at 575-576).

D. Even if the Interests Asserted by Detroit as the Goals of the Zoning Ordinances Classifying Protected Speech on the Basis of Content Could Be Deemed Compelling or Substantial, Detroit Has Failed to Sustain Its Heavy Burden of Proving Such Classification Necessary to Achieve the Alleged Interests; the Means Selected Are Not Narrowly Tailored to Achieve the Objectives.

1. On the record in this case, Detroit has failed to sustain its heavy burden of proving that theatres and bookstores which sell and exhibit books, magazines and films dealing with sex and nudity will, if "clustered" with other "regulated uses," cause neighborhood blight and deterioration. The affidavits and exhibits submitted by the City in the District Court contain nothing more than sweeping generalizations plainly based on the adverse consequences of concentrations of the "regulated uses" other than adult theatres and bookstores. None of the affidavits or exhibits contain any particularized showing that adult theatres and bookstores, as distinguished from flop houses, bars, pawnshops and the like, contribute in any manner whatsoever to the deterioration of surrounding neighborhoods. Thus, in the affidavit principally relied upon by Petitioners, that of Mel Ravitz, there is no specific discussion of the adverse effects, if any, caused by adult bookstores and theatres. On the contrary, Ravitz's analysis is general, speaking without differentiation of adult bookstores and theatres, taxi-dance halls, topless cabarets, shoeshine parlors, and the other "regulated uses" as a single category (See, pp. 10-11). The affidavit of Walsh is no different (See, pp. 11-12, *supra*).

The affidavit of Stewart fails to state any facts showing an adverse impact of adult theatres and bookstores on a surrounding neighborhood, other than those alleged to flow from the mere apprehensions and hostility of surrounding residents (See, p. 13, *supra*). The affidavit of Canevaro contains the same kind of undifferentiated analysis as in the Ravitz and Walsh affidavits. There is no specific discussion regarding the effects, if any, of adult bookstores and theatres upon the surrounding neighborhood (See, pp. 16-19, *supra*). The affidavit of Sheehy which is concerned only with Manhattan, New York deals primarily with the adverse effects of massage parlors and prostitution hotels, and states no facts to show that adult bookstores and theatres are themselves the cause of any social problems (See, p. 15, *supra*).

When a city attempts to impose restrictions upon a particular class of constitutionally protected speech solely on the basis of its content, its burden of proving that the classification is necessary to achieve a compelling state interest cannot be discharged by generalized statements of opinion such as Detroit has submitted here. Since Detroit's classification is subject to strict judicial scrutiny, the City cannot rely on any presumption of validity, but must carry a heavy burden of justification. See, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16-17 (1973). Detroit has not sustained its burden on the present record. See, *Healy v. James*, 408 U.S. 169, 189-190 (1972) [". . . if there were an evidential basis to support

the conclusion that [the group seeking campus recognition] posed a substantial threat of material disruption," the college would be justified in refusing recognition—"The record, however, offers no substantial basis for that conclusion."].[6]

Not only is there no evidentiary basis to support Detroit's assertion that adult theatres and bookstores contribute to neighborhood blight, but empirical research funded and directed by the Commission on Obscenity and Pornography suggests the absence of the alleged causal relationship. The Commission was established by the United States Congress as a result of Public Law 90-100. One of its tasks was to ascertain the methods employed in the distribution of sexually explicit materials and to explore the nature and volume of traffic in such materials. Report of the Commission on Obscenity and Pornography, Government Printing Office, 1970, page 73 (hereinafter referred to as "Report"). The Commission initiated a program of research designed to provide empirical information relevant to its tasks (Report, p. 2). Empirical studies of the patrons of adult bookstores and theatres, through observation and interviews with patrons and with bookstore and theatre owners and employees, were undertaken in cities throughout the United States, including Detroit (Report, p. 129). The Report contained the following findings:

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[6]Compare the evidentiary findings supporting the regulations upheld in *California v. La Rue*, 409 U.S. 109, 111 (1972) with the meager record herein. Moreover, in *La Rue* unlike the present case "the broad sweep of the Twenty-First Amendment has been recognized as conferring something more than the normal state authority over public health, welfare and morals." (409 U.S. at 114). In *La Rue*, the Court also recognized broader state power to regulate "the commission of public acts that may themselves violate valid penal statutes" as opposed to printed or filmed expression (409 U.S. at 117).

(a) "The profile of the patron of adult bookstores that emerges from these observations in different parts of the United States is: White, middle aged, middle class, married, male, dressed in business suit or near casual attire, shopping alone." (Report, p. 129).

(b) "Patrons of adult movie theatres may be characterized on the basis of these observations to be predominantly white, middle class, middle aged, married, males, who attend alone." (Report, p. 131).

(c) "Very few juveniles were observed looking at the displays outside the theatre." (Report, p. 130).

(d) ". . . customers of adult movie theatres manifest a good deal of upward socioeconomic mobility." (Report, pp. 133-134).

(e) One study consisted of intensive interviews with customers of adult bookstores and theatres contrasted to similar interviews with a control group. Results: "The two groups are fairly similar in terms of a variety of demographic variations except that the consumers of erotic materials are better educated and have higher level current occupations." (Report, p. 134).

(f) From the same study referred to in the preceding paragraph: "Activities most frowned upon by our society, such as sadomasochism, pedophilia, bestiality, and non-consensual sex, are also outside the scope of their interests [referring to customers of adult bookstores and theatres]." (Report, p. 134).

The foregoing findings of the Commission afford no empirical basis for the assertion that adult theatres and bookstores attract "undesirables" into a neighborhood so as to cause any legitimate concern on the part of neighboring residents or businessmen.

2. In addition to the lack of factual support for Detroit's contention that adult theatres and bookstores cause neighborhood decay, the City's classification of "regulated uses" is both under-inclusive and over-inclusive. See, *Jiminez v. Weinberger*, ... U.S. ....., 94 S.Ct. 2496 (1974) [under rational basis-equal protection test, classification both under-inclusive and over-inclusive fails rationally to serve any legitimate state interest].

When Dr. Ravitz submitted his letter to the corporation counsel in 1962, which letter is nearly identical to his 1973 affidavit, he stated in reference to the original classification of "regulated uses," not including adult theatres and bookstores, the following: "They certainly are not the only such uses that should be controlled; all-night movies, burlesque shows, drive-ins, etc., also must be controlled, because they, too, have the same undesirable image." (App. J, p. 11). Yet, not only did the 1972 amendment to the "Anti-Skid Row Ordinance" fail to include all-night movies and drive-in theatres in the category of "regulated uses," but Dr. Ravitz's 1973 affidavit conspicuously omitted the language quoted above. The all-night movie advertising three or four general release (non-sexually oriented) features for a discount price is a common phenomenon in blighted downtown urban areas. Because it remains open all night and charges a low admission price, it tends to attract transients looking for some place to spend the night. The all-night movie is distinguished by its operational characteristics, not by the content of the films exhibited. Yet it is not included in the "skid row" category. Drive-in theatres, also identified by Dr. Ravitz as a use which should be restricted,

were not included in the 1972 amendments. Drive-in theatres also are distinguished, not by the content of the films exhibits, but by their operational characteristics.

Similarly, massage parlors and other commercial establishments with a potential for becoming places of prostitution, were not included in the category of "skid row" uses, although massage parlors are prominent in the affidavit of Gail Sheehy submitted by Petitioners in the District Court. In addition, mission churches and rescue missions identified in the Canevaro affidavit as typically "skid row" uses are not included in the ordinance. Surely, low-priced all-night movies, mission churches, rescue missions and massage parlors are far more characteristic of deteriorating neighborhoods than are adult theatres and bookstores.

The zoning ordinance is over-inclusive as well. As discussed earlier, the City made no particularized showing to justify lumping adult theatres and bookstores together with topless cabarets,[7] pawnshops, flop houses, bars, shoeshine parlors, secondhand stores, and motels. Thus, even if the theory of the original Anti-Skid Row Ordinance is correct regarding the adverse effects of the "clustering" of uses with skid row images, Detroit has made no showing that adult theatres and bookstores properly belong in this category.

3. An additional interest is asserted by Detroit as underlying its classification. This additional interest

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[7]Compare *California v. La Rue*, 409 U.S. 109 (1972) with *Doran v. Salem Inn, Inc.*, ... U.S. ...., 95 S.Ct. 2561 (1975) [District Court did not abuse discretion in preliminarily enjoining enforcement of town ordinance prohibiting topless dancing—topless dancing can be speech entitled to First and

(This footnote is continued on next page)

appears in the City's Brief although it was not urged in the District Court and finds no support in the record. Thus, Petitioners suggest that the ordinances are intended "to protect and preserve residential zoning districts . . . with the intent of providing a suitable atmosphere for family living, and a suitable atmosphere to raise children." (Pets. Br., p. 21). But the prohibition against more than two "regulated uses" within 1,000 feet of a proposed location plainly was not designed to protect residential neighborhoods. The 1,000 foot provision is superimposed upon the City's basic zoning scheme dividing the City into areas zoned for residential, commercial, and industriai uses. Adult theatres and bookstores, like other commercial uses are not permitted in areas zoned exclusively for residential purposes, independent of the provisions of the "Anti-Skid Row" Ordinance.

The City's asserted interest in "protecting" residentially zoned districts from adult theatres and bookstores appears to refer instead to the recently amended ordinance prohibiting the location of adult theatres and bookstores within 500 feet of any residentially zoned district (App. I). The predecessor to this ordinance prohibited the location of adult theatres and bookstores within 500 feet of any residential unit, was declared unconstitutional by the District Court, and the City failed to appeal. The amended provision was not before the District Court nor the Court of Appeals, and is not before this Court. Of necessity, no record was made before the District Court with respect

Fourteenth Amendment protection—*La Rue* does not justify prohibition of topless dancing not confined to bars serving alcoholic beverages as part of a liquor licensing program].

to the new provisions.[8] In any event, the 500 foot provision is subject to all of the infirmities outlined in Points I and II of this Brief. In particular, Detroit has made no factual showing that adult theatres and bookstores contribute to neighborhood blight or cause any other adverse consequence when located within 500 feet from a residential zone. Many streets zoned for commercial purposes are located within 500 feet of residentially zoned districts in order to serve conveniently the needs of the adjacent residential district.[9]

E. To the Extent That Any Legislation Is Necessary to Promote a Compelling State Interest in Preventing Adult Theatres and Bookstores From Contributing to Neighborhood Blight, Less Drastic Means Are Available Which Do Not Broadly Stifle First Amendment Interests.

Respondents have argued that Detroit has no legitimate interest in limiting the locations available for adult theatres and bookstores simply to shield the public from a class of speech deemed offensive where the public's alleged fear of adult theatres and bookstores' contributing to neighborhood blight is based on nothing more than unsupported prejudices. Aside from the

[8]Petitioners appear to press for a ruling on the new 500 foot provision although it is not properly presented for review. See, *Cousins v. Wigoda*, ... U.S. ...., 95 S.Ct. 541, 551, n.1 (Rehnquist, J., concurring): "Gratuitous observations are particularly inappropriate in this area where the Court has long eschewed passing on issues not required for resolution of the case presented."

[9]To the extent that the City may be asserting an interest in protecting children from sexually oriented material, it is plain that the 1,000 foot provision is not directed toward this objective and is fatally overbroad if justified as necessary to protect children. See, *Butler v. Michigan*, 352 U.S. 380; *Erznoznik v. City of Jacksonville, supra*, 95 S.Ct. at 2274-2275.

content of expression sold or exhibited in theatres and bookstores, there are physical and operational characteristics of these and any other commercial establishments which may contribute to the appearance of neighborhood blight and resulting actual deterioration. Thus, the all-night movie, previously discussed, can be a factor contributing to a skid row atmosphere. Legislation limiting such businesses' hours of operation is a solution narrowly tailored to the nondiscriminatory state interest.

Similarly, the affidavit of Stewart objects to a "two block strip . . . ablaze with multi-colored expensive neon signs" (App. J, p. 23). Legislation with the aesthetic goal of preventing neon jungles can be enacted without discriminating against any particular class of expression. In addition, legislation aimed at improving the physical condition and appearance of dilapidated public buildings can help prevent a skid row appearance without discriminating against any class of protected speech. Further, large outdoor signs with stationery images offensive to passersby who cannot, as a practical matter, avoid exposure are no doubt subject to some regulation, although the extent of state power in this regard is not here presented. See, *Erznoznik v. City of Jacksonville, supra*, 95 S.Ct. at 2272-2274.

Finally, whether or not adult theatres and bookstores are able to "cluster" in any given area ultimately depends upon the public's willingness to patronize the businesses. An adult theatre or bookstore, no less than any other business, depends upon the financial support of the public for its continued existence. In a free society, the ability of the public to withhold its support from obnoxious ideas and expression is all the "protection" necessary.

II.

The Detroit Ordinances, 742-G and 743-G, Which Limit Severely the Locations Available Within the City for the Establishment of "Adult" Theatres and Bookstores Violate the Free Speech and Press Provisions of the First and Fourteenth Amendments Because the Ordinances Directly Abridge Protected Expression and, Alternatively, Even if Viewed as a Regulation of Non-Speech Elements in a Course of Conduct Which Incidentally Limits First Amendment Interests, the Ordinances Fail to Further a Compelling, Important or Substantial Governmental Interest, Fail to Serve Any Governmental Interest Unrelated to the Suppression of Free Expression, and Restrict the Exercise of First Amendment Freedoms in a Manner Far Greater Than Essential to the Furtherance of Any Legitimate Governmental Interest.

Respondents' analysis of the Detroit ordinances as violative of the freedoms of speech and press guaranteed by the First and Fourteenth Amendments, necessarily overlaps the previous analysis under the equal protection clause of the Fourteenth Amendment. Accordingly, Respondents will refer to portions of the discussion contained in Point I, *supra*, where appropriate, in the interest of avoiding unnecessary repetition.

As noted earlier, Detroit concedes that the zoning ordinances affect First Amendment interests, classify protected expression on the basis of its content, and thus must be shown necessary to promote a compelling state interest and must not broadly stifle individual liberties when the end can be more narrowly achieved. The City nevertheless seeks to support this

content-based limitation on First Amendment interests on the basis of several theories, discussed hereafter.

Before discussing Detroit's attempts to fit this restriction of First Amendment rights into one of the narrow categories heretofore recognized by this Court, two themes appear throughout the City's Brief which require comment.

A. State Power to Restrict First Amendment Interests Is No Greater Because Exercised in the Name of "Zoning."

The mere fact that the States have broad power to enact zoning regulations in the interests of public health, safety and welfare does not mean that this power can be exercised in a manner which abridges First Amendment interests. It is the "character of the right, not of the limitation," which governs the standard of judicial review. *Thomas v. Collins*, 323 U.S. 515, 530 (1945). Zoning, like libel, insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the represssion of expression that have been challenged in this Court, "can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).[10]

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[10]Compare, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) with *Gooding v. Wilson*, 405 U.S. 518 (1972); *Hess v. Indiana*, 414 U.S. 105 (1973), and *Louis v. City of New Orleans*, 415 U.S. 130 (1974) [Fighting words]; Compare *Valentine v. Chrestensen*, 316 U.S. 52 (1942) with *Bigelow v. Virginia*, ... U.S. ...., 95 S.Ct. 2222 (1975) [Commercial advertising]. See also, *Cox Broadcasting Corporation v. Cohn*, ... U.S. ...., 95 S.Ct. 1029 (1975) [Label of "invasion of privacy" does not alone warrant limitation of First Amendment

Because Detroit's exercise of its zoning power concededly restricts the exercise of First Amendment rights, the ordinances must measure up to strict standards of judicial review applicable where legislation affects First Amendment interests. Thus, a "mere showing of a legitimate state interest" will not suffice to justify the ordinances for even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. Precision of regulation must be the touchstone, and the least drastic means of satisfying even legitimate interests must be selected. *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973). The interest of the State in limiting First Amendment interests must be compelling. *Cousins v. Wigoda*, ... U.S. ...., 95 S.Ct. 541, 548, 549 (1975).

Accordingly, state interests and choices of means which might suffice to uphold legislation not affecting fundamental constitutional rights nevertheless may not survive the strict scrutiny required where, as here, such rights are affected. Contrast, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

B. The Ordinances Cannot Survive a First Amendment Challenge Merely Because They Restrict, but Do Not Altogether Prohibit, the Locations Available for the Establishment of "Adult" Theatres and Bookstores.

Throughout Petitioners' Brief, it is suggested that a less critical standard of review should be applied because the ability of adult theatres and bookstores

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rights]; *Erznoznik v. City of Jacksonville*, ... U.S. ...., 95 S.Ct. 2268 (1975) [Protection of alleged "captive audience" theory did not justify ordinance restricting First Amendment interests].

to locate within the City of Detroit is not absolutely prohibited. See *e.g.*, Brief for Petitioners, pp. 14, 23, 33, 55. It is urged that the ordinances only "regulate," and do not prohibit. But this Court always has adhered to the admonition in *Hague v. CIO*, 307 U.S. 496, 516, that First Amendment freedoms "must not, in the guise of regulation, be abridged or denied."

Thus, in *Erznoznik v. City of Jacksonville*, ... U.S. ...., 95 S.Ct. 2268 (1975), it was suggested that since drive-in theatres could construct barriers to shield their screens from passersby, the ordinance did not preclude drive-in theatres from exhibiting films containing nudity. The Court pointed out, however, that the erection of such barriers would impose a cost that could deter drive-ins from exhibiting constitutionally protected films, and that "Such a deterrent, although it might not result in total suppression of these movies, is a restraint on free expression. See, *Speiser v. Randall*, 357 U.S. 513, 518-519. . . ." (95 S.Ct. at 2274, n.8).

In *Southeastern Promotions, Ltd. v. Conrad*, ... U.S. ...., 95 S.Ct. 1239 (1975), the city sought to justify its refusal to lease the municipal auditorium to the producers of the stage play "Hair" on the ground that the play could be produced in a privately owned theatre in the city. The Court rejected this argument, stating that even if a privately owned forum was available, "that fact alone would not justify an otherwise impermissible prior restraint." (95 S.Ct. at 1245). The Court quoted the statement in *Schneider v. State of New Jersey*, 308 U.S. 147, 163 (1939), that "One is not to have the exercise of his liberty of expression in appropriate places abridged on the

plea that it may be exercised in some other place." The Court in *Southeastern Promotions* concluded that "It does not matter . . . that the Board's decision might not have had the effect of total suppression of the musical in the community." (95 S.Ct. at 1245). The Court pointed to the decisions in *Interstate Circuit v. Dallas*, 390 U.S. 676, 688 (1968) and *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). In *Interstate*, a licensing scheme was held to violate the First Amendment even though its "regulation of expression" was "one of classification rather than direct suppression." And in *Bantam Books*, a state system of "informal censorship" without direct regulatory or suppressing functions was nevertheless held to violate the First Amendment.

In *Miami Herald Publishing Company v. Tornillo*, ... U.S. ...., 94 S.Ct. 2831 (1974), the State argued that its right-to-reply statute did not amount to a restriction of the newspaper's freedom of expression because "the statute in question here has not prevented the Miami Herald from saying anything it wished." The Court held that this argument begged the question. Noting that "Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers," the Court concluded that "The Florida statute exacts a penalty on the basis of the content of the newspaper." (94 S.Ct. at 2839). In the first place, the Court deemed significant the penalty resulting from the compelled printing of a reply in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to

print. Faced with such costs, the newspaper might well be deterred from vigorous political and electoral coverage (94 S.Ct. at 2839). But even if the right-to-reply statute imposed no actual costs or deterrents, the statute nevertheless violates the First Amendment because it seeks to influence a newspaper's exercise of editorial control and judgment, and this is a direct abridgment of First Amendment rights (94 S.Ct. at 2839-2840).

In *Spence v. Washington*, ... U.S. ...., 94 S.Ct. 2727 (1974), the Court reversed a conviction under a state flag desecration statute based upon the appellant's display of an American flag with a peace symbol attached. The State Supreme Court, in affirming the conviction, had found the inhibition on appellant's freedom of expression "minuscule and trifling" because there were "thousands of other means available to [him] for the dissemination of his personal views." This Court held that such an argument "must be rejected summarily." (94 S.Ct. at 2731, n.4). The Court concluded that appellant had engaged in a form of protected expression and could not be penalized therefor.

In *Kusper v. Pontikes*, 414 U.S. 51 (1973), the Court stated that any "significant interference" with First Amendment interests, although not amounting to total prohibition, must be subjected to strict judicial scrutiny. In *Kusper*, the Court held the First Amendment right of political association was infringed by a state statute prohibiting a person from voting at a party primary if he had voted at the primary of another political party within the preceding 23 months.

The Court rejected the contention that the 23-month rule did not deprive persons of all opportunities to associate with the political party of their choice.

> "But neither did the State attempts to compel disclosure of NAACP membership lists in Bates v. Little Rock and NAACP v. Alabama work a total restriction upon the freedom of the organizations' members to associate with each other. Rather, the Court found in those cases that the statutes under attack constituted a 'substantial restraint' and a 'significant interference' with the exercise of the constitutionally protected right of free association.
>
> "The same is true of [the statute in question]." (414 U.S. at 58).

In *Healy v. James*, 408 U.S. 169 (1972), the Court held that a state college president's denial of official campus recognition to the applicant, a local chapter of Students for a Democratic Society, violated the First Amendment. The State argued that the denial of campus recognition was an insubstantial interference with the First Amendment right of association; that the group was denied nothing more than the "administrative seal of official college respectability"; that the group still could meet as a group off campus, still could distribute written material off campus, and still could meet together informally on campus, as individuals (408 U.S. at 182-183). Nevertheless, the Court found impediments to freedom of association flowing from non-recognition in the denial of the use of campus facilities for meetings and other purposes, and a denial of the use of campus bulletin boards and the school

newspaper. "Such impediments cannot be viewed as insubstantial." (408 U.S. at 182).

In *Healy*, the Court stated that "The Constitution's protection is not limited to direct interference with fundamental rights. . . . We are not free to disregard the practical realities. Mr. Justice Stewart has made the salient point: 'Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.' Bates v. City of Little Rock, 361 U.S. 516, 523. . . ."(408 U.S. at 183).

In *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972), the ordinance prohibiting nonlabor picketing within 150 feet of any primary or secondary school was not saved merely because such picketing still could be conducted across the street from the school (408 U.S. at 93, n.1).[11] See also, *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

In view of the foregoing, Detroit cannot sustain the validity of its ordinances against First Amendment challenge merely by labelling them a "regulation" and not a prohibition. Regardless of the label, the ordinances impose a significant interference with the First Amendment interests of Respondents, other persons similarly situated, and the public generally. In the first place, the 1,000 foot limitation does not apply merely to

[11]In *Pell v. Procunier*, ... U.S. ...., 94 S.Ct. 2800 (1974), the Court upheld against a First Amendment attack prison regulations barring certain interviews between prisoners and the press, relying in part on alternative avenues of communication between prison inmates and persons outside. But the Court cautioned that "We would find the availability of such alternatives unimpressive if they were submitted as justification for governmental restriction of personal communication among members of the general public." (94 S.Ct. at 2805).

preclude the location of more than two adult theatres and bookstores within 1,000 feet, but prohibits the location of an adult bookstore or theatre if there are already two or more of any of the "regulated uses" within 1,000 feet of the proposed location. Thus, if an adult theatre proposes to locate on a city block in which a motel and bar already are located, the adult theatre is excluded. Similarly, if a shoeshine parlor and pawnshop are already on the block, an adult bookstore is excluded. Indeed, even if an established non-adult bookstore wishes to open a section restricted to adults and featuring sexually oriented reading material, it cannot do so if two or more of the "regulated uses" already are in existence within 1,000 feet. The ordinances thus act to impose special restrictions on one particular class of constitutionally protected expression not applicable to all others. Similar to the ordinance struck down in *Erznoznik v. City of Jacksonville, supra*, the ordinances here may deter booksellers and theatre owners from disseminating the one form of speech subject to the special restrictions.

Moreover, to whatever extent adult theatres and bookstores do tend to locate close to one another, they do so presumably because a larger market of consumers thus becomes available. If it is true that the consumer of sexually oriented reading and viewing material prefers to shop in an area where several outlets are available, the restrictions contained in the ordinances impose an economic disadvantage on the proprietors of adult theatres and bookstores as well as a burden upon the consuming public. Plainly, "Such impediments cannot be viewed as insubstantial." *Healy v. James*, 408 U.S. 169, 182 (1972).

Finally, just as the right-to-reply statute condemned in *Miami Herald Publishing Company v. Tornillo,* ..... U.S. ....., 94 S.Ct. 2831 (1974), the ordinances here constitute an attempt by Government to influence and control the "editorial" judgment of proprietors and prospective proprietors of theatres and bookstores. This is flatly inconsistent with the command of the First Amendment.

C. The Ordinances Here Must Be Analyzed as a Direct Abridgment of First Amendment Interests, Not as a Regulation of Non-Speech Elements in a Course of Conduct Which Only Incidentally Limits First Amendment Interests.

1. Petitioners place their principal reliance on *United States v. O'Brien,* 391 U.S. 367 (1968), contending that the ordinances regulate conduct, have only an incidental effect on First Amendment interests, and thus may be upheld if the standards enunciated by the Court in *O'Brien* are satisfied. Respondents contend, on the contrary, that the ordinances in the present case do not fit the *O'Brien* mold.

In *O'Brien,* the statute proscribing destruction of draft cards did not abridge free speech on its face. The Court stated that the statute "on its face deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct." (391 U.S. at 375). In the present case, the zoning ordinances on their face do abridge First Amendment rights by

directly limiting the locations available to theatres and bookstores whose content consists of "adult" but nonetheless constitutionally protected expression. Detroit's ordinances, with respect to adult theatres and bookstores, regulate no conduct independent of the content of the books, magazines, or films sold or exhibited.

2. If it can be said that the establishment of an adult theatre or bookstore in a particular location is "conduct," nevertheless both the objective and the operation of the ordinances is with the communicative aspect of the alleged conduct. In *O'Brien,* however, the governmental interest was to assure the continued availability of issued draft cards. The statute prohibited the conduct of mutilating draft cards and nothing more. "In other words, both the governmental interest and the operation of the [statute] are limited to the non-communicative aspect of O'Brien's conduct." (391 U.S. at 381-382). The Court in *O'Brien* thus found the case "unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." As an example, the Court cited *Stromberg v. California,* 283 U.S. 359 (1931), in which the Court struck down the statutory phrase which punished people who expressed their "opposition to organized government" by displaying "any flag, badge, banner, or device." "Since the statute there was aimed at suppressing communication it could not be sustained as a regulation of non-communicative

conduct. See also, NLRB v. Fruit and Vegetable Packers Union, 377 U.S. 58, 79, . . . (1964) (concurring opinion)." (391 U.S. at 382).

The governmental interests underlying the Detroit ordinances and the operation of the ordinances are analogous to *Stromberg*, and not to *O'Brien*. Here, Detroit's alleged interests arise because the communication allegedly integral to the conduct of establishing adult theatres and bookstores in a particular location is itself thought harmful. Detroit asserts that its citizens react adversely only to the presence of theatres and bookstores distinguished by the content of the materials sold or exhibited.

A statute which limits First Amendment interests on the basis of the content of expression never can be analyzed as a mere "incidental" restriction of free speech arising from governmental regulation of conduct intertwined with speech. See, *e.g.*, *Erznoznik v. City of Jacksonville*, ... U.S. ...., 95 S.Ct. 2268, 2272-2274 (1975); *Cox Broadcasting Corporation v. Cohn*, ... U.S. ...., 95 S.Ct. 1029, 1046 (1975); *Miami Herald Publishing Company v. Tornillo*, ... U.S. ...., 94 S.Ct. 2831, 2839-2840 (1974); *Pell v. Procunier*, ... U.S. ...., 94 S.Ct. 2800, 2805, 2806, 2807 (1974); *Spence v. Washington*, ... U.S. ...., 94 S.Ct. 2727, 2730, 2732, n.8 (1974); *Papish v. Board of Curators of University of Missouri*, 410 U.S. 667, 670-671 (1973); *Police Department of City of Chicago v. Mosley*, 408 U.S. 92 (1972); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); *Cohen v. California*, 403 U.S. 15 (1971).

D. Even if the Ordinances Are Analyzed as an "Incidental" Limitation on Speech Resulting From Governmental Regulation of a Single Course of Conduct Involving Both Speech and Non-Speech Elements, the Ordinances Fail to Satisfy the O'Brien Tests.

In *United States v. O'Brien, supra,* 391 U.S. at 377, the Court stated:

> "[A] government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

1. The Detroit ordinances are not within the constitutional power of the Government; the interests principally asserted are not legitimate. Respondents contend that Detroit's interest in preventing the "clustering" of adult theatres and bookstores because of the public's undifferentiated fears and apprehensions concerning theatres and bookstores disseminating speech deemed offensive is not a legitimate state interest within the constitutional power of Government. See, the discussion and cases cited in I-B, *supra*, pp. 35-48.

2. The interests principally asserted by Detroit are not so important, substantial, or compelling as to justify a restriction on First Amendment rights based solely on content. Respondents here contend that even if Detroit's alleged interest in preventing the "clustering" of adult theatres and bookstores together with other "regulated uses" on the basis of the public's undiffer-

entiated fears and apprehensions concerning expression deemed offensive could be considered a legitimate interest, such interest nevertheless is insufficiently compelling or substantial to justify discrimination among classes of constitutionally protected expression solely on the basis of content. See, I-C, *supra*, pp. 49-55.

3. Even if Detroit's interests are legitimate and compelling, the means selected have not been shown necessary to achieve the objectives. Respondents contend that Detroit has failed to sustain its heavy burden of proving its content-based classification necessary to achieve the alleged interests. Moreover, the means selected are not narrowly tailored to achieve the objectives. See, I-D, *supra*, pp. 56-63.

4. The interests asserted by Detroit are not unrelated to the suppression of free expression. Respondents contend that the ordinances in the present case, unlike the statute in *O'Brien*, limit First Amendment interests on their face. See, II-C(1), *supra*, pp. 74-75. Respondents also contend that Detroit's alleged interests arise because the communication allegedly integral to the "conduct" of establishing adult theatres and bookstores in particular locations is itself thought harmful, and the state interests therefore are directly related to the restriction of First Amendment rights. See, II-C(2), *supra*, pp. 75-76.

5. Detroit's "incidental" restriction on First Amendment interests is greater than essential to the furtherance of its alleged interests. Respondents here contend that to the extent any legislation is necessary to promote an alleged compelling state interest in preventing adult theatres and bookstores from contributing to neighborhood blight, less drastic means are available which do not broadly stifle First Amendment interests. See, I-E, *supra*, pp. 63-64.

E. The Zoning Ordinances Cannot Be Upheld as Time, Place or Manner Regulations Because They Discriminate Against One Class of Expression on the Basis of Its Content.

Petitioners seek to uphold the ordinances herein by analogy to the decisions of this Court sustaining time, place or manner regulations of expressive activity. See, Brief for Petitioners, pp. 9, 37, 52-54. This attempt is unavailing because the Court consistently has held that valid time, place or manner regulations of speech must be neutral and cannot impose restraints on the basis of the content of expression. See, *Erznoznik v. City of Jacksonville*, ... U.S. ...., 95 S.Ct. 2268, 2272 (1975) ["A state or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content."]; *Papish v. Board of Curators of University of Missouri*, 410 U.S. 667, 670-671 (1973) ["petitioner was expelled because of the disapproved *content* of the newspaper rather than the time, place, or manner of its distribution."]; *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 99 (1972) ["the ordinance itself describes impermissible picketing not in terms of time, place, and manner, but in terms of subject matter. . . . This is never permitted."]. See also, *Pell v. Procunier*, ... U.S. ...., 94 S.Ct. 2800, 2805, 2806, 2807 (1974); *Adderley v. State of Florida*, 385 U.S. 39, 46-47 (1966); *Cox v. Louisiana*, 379 U.S. 559, 569 (1965); *Poulos v. New Hampshire*, 345 U.S. 395, 405 (1953); *Cox v. New Hampshire*, 312 U.S. 569, 575-576 (1941).

F. The Zoning Ordinances Cannot Be Upheld Under a Theory of Protecting a "Captive Audience."

Petitioners suggest for the first time in their Brief that the ordinances are intended to prevent adult theatres and bookstores from being thrust upon a "captive audience." See, Brief for Petitioners, pp. 35-36. This theory is totally without foundation. The ordinances do not regulate the manner in which adult theatres or bookstores may operate, but rather limit their ability to locate within a specified distance from other "regulated uses." The ordinances are not directed at any alleged thrusting of offensive communication upon persons unable to avoid exposure. See, *Erznoznik v. City of Jacksonville, supra,* 95 S.Ct. at 2272-2274. Nor is there here any issue of whether a public forum for First Amendment activity has been established. See, *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974).

G. The Zoning Ordinances Cannot Be Justified as a Governmental Effort to Protect Minors From Sexually Oriented Materials.

Petitioners also fleetingly suggest, for the first time, that protection of minors somehow underlies the ordinances. See, Brief for Petitioners, p. 21. However, the ordinances are not directed to preventing the establishment of adult theatres and bookstores in locations where children are likely to congregate.[12] Nor is the 1,000 foot provision in any way designed to "protect" exclusively residential neighborhoods. Plainly, the present ordinances do not reveal a limited and focused

[12]Whether such an ordinance could be sustained is a question not here presented.

state concern to shield juveniles from sexually explicit matter. See, *Erznoznik, supra,* 95 S.Ct. at 2274-2275.

H. The Waiver Provisions of §66.0101 Do Not Save the Ordinances Because the Commission's Authority to Waive the 1,000 Foot Provision Is Wholly Discretionary, Lacking Narrow and Definite Standards.

Section 66.0101 (App. G, p. 68) provides that the City Plan Commission "may waive" the 1,000 foot provision for adult bookstores, theatres and the other "regulated uses" if designated findings are made. The findings include that the proposed use "will not be contrary to the public interest"; that the "spirit and intent of this ordinance will be observed"; that the establishment of an additional regulated use in the area "will not be contrary to any program of neighborhood conservation"; and that "all applicable regulations of this ordinance will be observed." (App. G, p. 68).

Even if the Commission were required to waive the 1,000 foot provision if the designated findings are made, the standards contained in the waiver provision are so imprecise and indefinite as to permit the Commission virtually unbridled discretion to deny a waiver. Similar broad and indefinite standards in administrative licensing schemes affecting First Amendment rights frequently have been condemned by the Court. See, *Southeastern Promotions, Ltd. v. Conrad,* .... U.S. ...., 95 S.Ct. 1239, 1243-1245 (1975), and cases cited therein.

III.

Detroit Ordinance 743-G, Requiring Adult Theatres to Be Licensed by the Mayor but Permitting the Mayor to Refuse Such License on the Basis of Broad and Indefinite Standards, and Lacking Any Procedural Safeguards, Constitutes an Impermissible Prior Restraint of First Amendment Rights and Further Deprives Persons Desiring to Operate Adult Theatres of the Equal Protection of the Laws, Contrary to the First and Fourteenth Amendments.

Ordinance 743-G additionally requires adult theatres, but not adult bookstores or theatres generally, to be licensed by the Mayor, and provides that the Mayor may refuse to issue a license, and may revoke any license already issued,

> "upon proof submitted to him of the violation by an applicant, or licensee, his agent or employee, within the preceding two years, of any criminal statute of the State, or of any ordinance of this City regulating, controlling or in any way relating to the construction, use or operation of any of the establishments included in this article which evidences a flagrant disregard for the safety or welfare of either the patrons, employees, or persons residing or doing business nearby." (App. G, p. 82).

In a long line of decisions, this Court consistently has struck down administrative schemes licensing the exercise of First Amendment activities in the absence of precise and clear standards. When officials are granted discretion to grant or deny licenses for speech-related activity on the basis of broad and indefinite standards, the potential for unbridled prior censorship

is too great to permit such schemes to stand. See, *Southeastern Promotions, Ltd. v. Conrad,* .... U.S. ...., 95 S.Ct. 1239, 1243-1245 (1975), and cases cited therein; *Interstate Circuit, Inc. v. Dallas,* 390 U.S. 676, 682-685 (1968), and cases cited therein. Detroit's licensing provision permits the Mayor to refuse to issue a license to an adult theatre if an "agent or employee" of the applicant has within the past two years violated any state criminal statute or any city ordinance "in any way relating" to the construction, use or operation of designated amusement businesses "which evidences a flagrant disregard for the safety or welfare of either the patrons, employees, or persons residing or doing business nearby." The alleged standards contained in the ordinance really are no standards at all. To permit a local official discretion to deny a license because any employee of the applicant has violated a city ordinance which, in the Mayor's opinion, "evidences a flagrant disregard" for public welfare, is to permit virtually unfettered prior censorship. See, *Cantwell v. Connecticut,* 310 U.S. 296, 305 (1940) ["He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion."]; *Hague v. CIO,* 307 U.S. 496, 516 (1939) [The official was empowered to refuse permit upon his opinion that he would thereby prevent "riots, disturbances or disorderly assemblage"]; *Gelling v. State of Texas,* 343 U.S. 960 (1952) ["of such character as to be prejudicial to the best interests of the people of said city"].

Detroit's licensing scheme for adult theatres is a system of prior restraint which "comes to this Court

bearing a heavy presumption against its constitutional validity." *Southeastern Promotions, Ltd. v. Conrad, supra,* 95 S.Ct. at 1246.

In addition, the licensing scheme fails to contain any of the procedural safeguards required by this Court where licensing schemes operate as a prior restraint. See, *Southeastern Promotions, Ltd. v. Conrad, supra,* 95 S.Ct. at 1247-1248; *Freedman v. Maryland,* 380 U.S. 51 (1965). Recognizing the procedural deficiencies of the scheme, Petitioners suggest that "the requirements of due process will be read into, or implied, in the law when necessary to protect the constitutional rights of the applicants." (Brief for Petitioners, p. 57). But the Michigan state courts have not construed these provisions to provide the necessary procedural safeguards, and this Court "lack[s] jurisdiction authoritatively to construe state legislation." See, *United States v. Thirty-Seven Photographs,* 402 U.S. 363, 369 (1971); *Freedman v. Maryland, supra; Teitel Film Corp. v. Cusack,* 390 U.S. 139 (1968). Petitioners' suggestion that "time is not of the essence" to a person seeking a license to conduct a business (Brief, p. 58) plainly is incorrect. The First Amendment rights of a prospective proprietor of a theatre easily can be strangled to death by administrative delay in a licensing scheme. Indeed, the procedural safeguards enunciated in *Freedman* perhaps are even more necessary where the very existence of a theatre is at stake. See, *Burton v. Municipal Court,* 68 Cal.2d 684, 441 P.2d 281, 68 Cal.Rptr. 721 (1968); *Perrine v. Municipal Court,* 5 Cal.3d 656, 448 P.2d 648, Sup., 97 Cal.Rptr. 320 (1971).

In addition to the foregoing, Detroit not only has singled out "adult" theatres from all other theatres in imposing a license requirement, but it further has distinguished between adult theatres and adult bookstores, the latter not being required to be licensed. Yet the record contains not so much as a suggestion as to why only adult theatres need to be licensed any more than theatres generally, or why if the "adult" nature of the material is determinative, adult bookstores are exempted. Plainly, the singling out of adult theatres is an invidious discrimination in violation of the equal protection clause.

Conclusion.

For all of the foregoing reasons, the judgment of the Court of Appeals herein should be affirmed.

Respectfully submitted,

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